A HISTORY OF ENGLISH LAW

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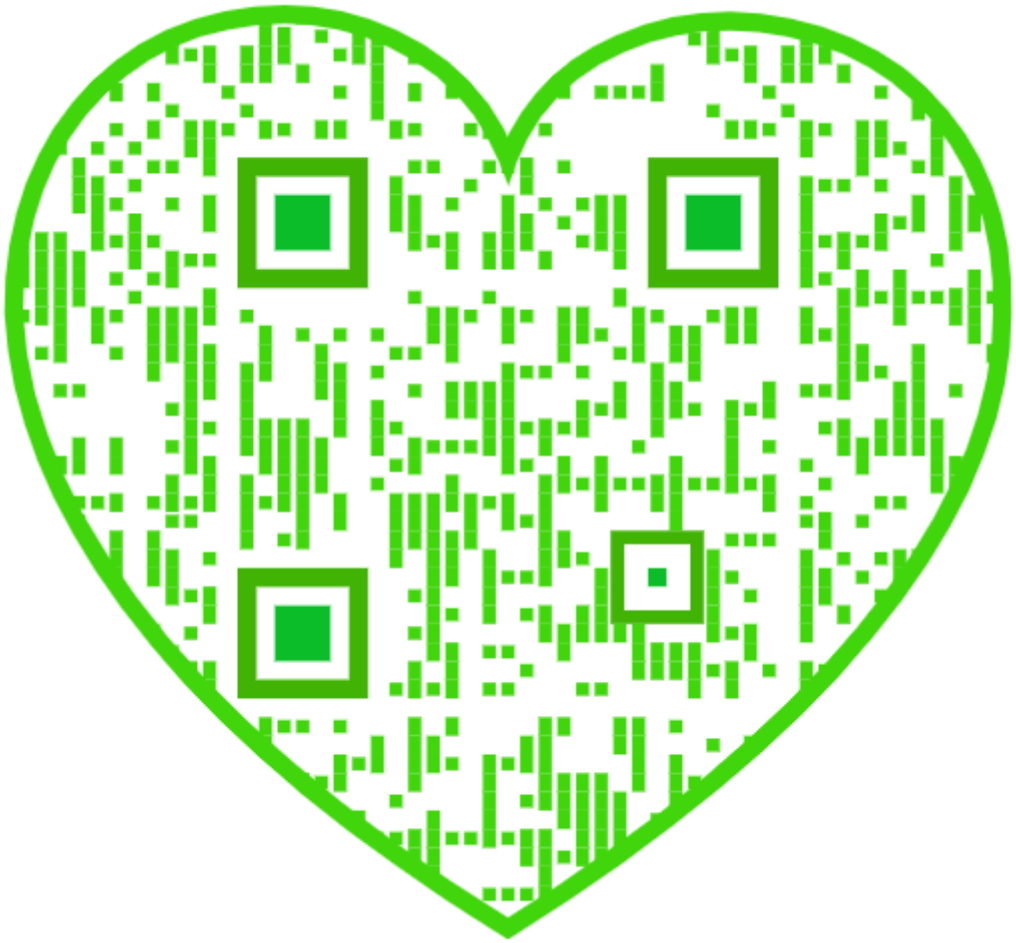
VOLUME III

THIRD EDITION, REWRITTEN

To say truth, although it is not necessary for counsel to know what the history of a point is, but to know how it now stands resolved, yet it is a wonderful accomplishment, and, without it, a lawyer cannot be accounted learned in the law.

ROGER NORTH

METHUEN & CO. LTD.
36 ESSEX STREET W.C.
LONDON



First Published . . . . *May 1903*
Second Edition . . . . *October 1914*
Third Edition, Rewritten . . *1923*

PRINTED IN GREAT BRITAIN

TO

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EARL BIRKENHEAD

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ERRATUM

P. 284, n. 5. *For* "withernamio" *read* "vetito namio."

BOOK III

(1066-1485)

THE MEDIÆVAL COMMON LAW (*Continued*)

A HISTORY OF ENGLISH LAW

PART II

THE RULES OF LAW

CHAPTER I

THE LAND LAW

I HAVE already described in outline the general features of the development of the land law during this period. Here I shall trace in somewhat greater detail the history of some of its more important doctrines. All through this period it holds the first place both for political and legal reasons. My arrangement of the subject will be as follows: § 1. The Real Actions; § 2. Free Tenure, Unfree Tenure, and Chattels Real; § 3. The Free Tenures and their Incidents; § 4. The Power of Alienation; § 5. Seisin; § 6. Estates; § 7. Incorporeal Things; § 8. Inheritance; § 9. Curtesy and Dower; § 10. Unfree Tenure; § 11. The Term of Years; § 12. The Modes and Forms of Conveyance; § 13. Special Customs.

§ 1. The Real Actions

In the developed common law a real action was an action in which the specific thing demanded could be recovered; and, as, in the great majority of cases, it was only certain interests in or incorporeal rights over land,[1] which were so recoverable, they could be defined with substantial accuracy by Blackstone as "actions whereby the plaintiff . . . claims title to have any lands or tenements, rents, commons, or other hereditaments, in fee simple, fee tail, or for term of life."[2] Any action, even an action of covenant, in which the land itself was recovered, was classed as a real action;[3] while certain actions, such as the action of waste, in which both the land and damages could be recovered, were

[1] Many incorporeal things, such as offices or corrodies were, from the point of view of remedies, and in some other respects, treated like land, vol. ii 355-357; below 97-101, 151-153.

[2] Bl. Comm. iii 117-118.

[3] For this action of covenant real, whereon fines were usually levied, see Maitland, Collected Papers i 448; Forms of Action 358.

classed as mixed.[1] But when Bracton wrote, the common law had not attained this classification of actions; and the term real action had not developed its modern meaning. Bracton, as Maitland points out,[2] "knew too much of Roman law to call an action 'real' merely because the successful plaintiff will thereby obtain possession of a specific thing. The novel disseisin, for example, is *actio personalis;* it may be *rei persecutoria*, but it is *personalis*. . . . With him the test is rather the nature of the mesne than the nature of the final process. If the mesne process is against the thing, if e.g. the land is seised into the king's hand, the action is real, but if, as in the assize of novel disseisin, the process is attachment, then the action is personal." But long before the close of the mediæval period the term "real action" had acquired its modern meaning. Bracton himself uses the term in this sense;[3] and, when at the close of the thirteenth century, English lawyers ceased to know anything about the terminology and rules of Roman law,[4] it was in this sense that they used the term.[5] It is in this sense that I use it in this section.

The learning of the real actions is the foundation of by far the greater part of the land law of the Middle Ages. The leading divisions of our law of property at the present day—the divisions into realty and personalty, and into land held by freehold tenure, by copyhold tenure, and for a term of years—can be traced ultimately to the rules which defined the scope of these real actions. Similarly, as we may see from Littleton's book,[6] many of the doctrines of the land law, both of the Middle Ages and of the present day, took their shape, in the first instance, from the various real actions which protected many and various rights in the land. In order, therefore, to understand the mediæval land law it is necessary to approach it from the point of view of the real actions, just as in Roman law it is necessary to approach the conceptions of "dominium ex jure Quritium," "bonitary ownership," and "possession" from the point of view of the various remedies which protect them. Moreover, in approaching the subject in this way we are placing ourselves at the point of view of our earliest authorities—Glanvil and Bracton. Littleton, it is true, does not approach the subject from this point of view; but his treatise was a treatise primarily upon tenures and estates; and, when he discusses the principles of the law, he assumes a knowledge of the real actions. The doctrines which he discusses cannot be understood without a knowledge of the law of real actions, any more than the doctrines discussed by Gaius and

[1] Bl. Comm. iii 118.
[2] Collected Papers i 448; Forms of Action 370-371; cf. vol. ii 261.
[3] f. 159b.
[4] Vol. ii 287-288.
[5] P. and M. ii 568.
[6] Vol. ii 582-588.

Justinian in the second and third books of their Institutes can be understood without some reference to some of the topics discussed in their fourth books.

In dealing with the real actions, I shall, in the first place, describe those by means of which a person could assert his right to the seisin of corporeal hereditaments held by free tenure; and, in the second place, I shall enumerate some of the more important of the other real actions, or actions real in their nature,[1] which protected other rights incident to land-holding. Their enumeration will show us the skeleton round which the largest part of the body of the mediæval land law grew up.

The Actions by which Rights to Corporeal Hereditaments of Free Tenure were Asserted

These actions may be divided into three groups, (i) the writ of right group; (ii) the assize of novel disseisin; and (iii) the writs of entry sur disseisin. This division represents the chronological order of development. As in Roman law we see in the Legis Actio Sacramenti the most primitive form of real action, and in the new formulary procedure *per sponsionem* and *per formulam arbitrariam* successive improvements upon the primitive form;[2] so in English law the writs of right are our oldest form of real action, while the assize of novel disseisin and the writs of entry represent the new improvements effected by royal justice. In both systems the survivals of the older forms mark definite periods of historical development.

(i) The writ of right group.[3]

There are three varieties of the writ of right—the writ of right patent, the præcipe in capite, and the little writ of right. The last named was the writ by means of which the tenant in ancient demesne could recover his land; and I shall speak of it again when I discuss that tenure.[4]

The writ of right patent was the original form of the writ of right. "It is," says Booth, "the general writ of right;" "and it hath the greatest respect and the most assured judgment."[5] This form of the writ was used when the land was held of a mesne lord. It was directed to the lord of whom the land was held, and ordered him to do full right to his tenant. If the lord waived his right to his court, a special variety of the writ, known as the writ of right "quia dominus remisit curiam," was directed to the sheriff, and proceedings thereon were had in the king's court.[6] It was

[1] Booth, Real Actions 86, 87, 125. [2] Girard, Droit Romain 327-332.

[3] For the forms see vol. i App. V A, B, and C.

[4] Vol. ii 378, 578; below 265-266; Booth, Real Actions 116, 117; App. Ia (12).

[5] Booth, op. cit. 87. Booth treats separately the writ of right in London; but, as he says, "it is of the same nature with the writ of right patent, only different as to the place where the lands lie, i.e. concerning lands in London," ibid 117.

[6] Vol. i 178.

thus essentially a feudal and not a royal plea, so that it is not surprising to find that such pleas were not stopped, as most royal pleas were stopped, by the coming of the Eyre.[1] The præcipe in capite directed to the sheriff was the proper writ when the land was held in chief of the king. By it the sheriff was directed to order the tenant to restore to the demandant the land in question, and if he did not so restore it, to summon him to show why he had not done so. The proceedings upon it took place in the king's court. If it be true that originally a writ of right was so called because it ordered a lord to do full right to the demandant, this form of the writ cannot properly be classed as a writ of right. But, as Maitland has pointed out,[2] "when possessory actions had been established in the king's court 'right' was contrasted with 'seisin,' and all writs originating proprietary actions for land, including the præcipe in capite, came to be known as writs of right."

The præcipe in capite ought only to have been allowed when the land in dispute was held of the king in chief. But Henry II., pursuing the policy of attracting to the king's court jurisdiction over all cases concerning land held by free tenure, had extended the scope of the præcipe in capite from the cases where the land was held in chief to cases where it was held of a mesne lord. It was this extension which the Barons effectively checked by the thirty-fourth clause of Magna Carta.[3] As the result of this clause a plea begun by the writ præcipe in capite could, even at the last stage of the action, be stopped by showing that the land was not held of the king.[4]

These writs of right carried with them to the end many marks of their great antiquity. We see a survival of the days when litigants could buy procedural advantages of the crown[5] in the tender of the demi mark. If the tenant tendered this sum at the proper time (what was the proper time was "a great question in law"[6]) he could defeat the demandant, if the demandant was not seised in the reign of the king alleged in his count; otherwise the Grand Assize[7] could find for the demandant if his ancestor had been seised at a time more remote.[8] We see a survival of the old

[1] "The third cry was that no court or county court should be holden within the said county during the continuance of the Eyre save by reason of some plea of land, and that by writ of right patent, or for appeals in the county court," Eyre of Kent (S.S.) i 7; for this effect of the coming of the Eyre see vol. i 266-267.

[2] Collected Papers ii 129 n 1; Forms of Action 318.

[3] Vol. i 58-59; see McKechnie, Magna Carta (2nd ed.) 346-355; Maitland, Forms of Action 317-318.

[4] Eyre of Kent (S.S.) ii 86-87; cp. Y.B. 20, 21 Ed. I. (R.S.) 72-74.

[5] Vol. i 57-58; there are some illustrations of this step in the proceedings in Y.B. 5 Ed. II. (S.S.) (1312) 26, 44; it was probably because its object was to buy a procedural advantage that it could not be tendered as against the king, Y.B. 20 Ed. III. (R.S.) i 416.

[6] Booth, Real Actions 98.

[7] For the Grand Assize see vol. i 327-329.

[8] Litt. § 514, "*Herle*, Justice, said to the Grand Assize after that they were charged upon the mere right, You good men, Reynold [the tenant] gave half a mark

rule that a defendant must deny the plaintiff's case in every detail with minute accuracy.[1] Trial by battle was possible till 1819.[2] The tenant need not make use of any pleas open to him: he might submit the whole case to the battle or the Grand Assize—"he can insist that the whole question of better right, involving, as it may, the nicest questions of law, shall be left all in one piece to the knights of the neighbourhood; if he fears their verdict he can trust to the god of battles; he can force the demandant to a *probatio divina* which is as much to be dreaded as any *probatio diabolica* of the canonists."[3]

The proceedings decided the question of better right only as between the parties. The mere judgment bound no one else. A stranger was only bound if, being under no disability, he did not claim within a year and a day after execution of the judgment.[4] Success in the writ of right therefore did not depend upon absolute right, but upon *majus jus*. We shall see that the tenant could not defend himself by setting up a *jus tertii*, through which he did not claim, in order to disprove the demandant's title.[5] If the demandant's title was better than the tenant's he would recover. At the same time the action is a real action, brought to assert the demandant's right to the land. It is no mere delictual action in which the demandant accuses the tenant of ouster forcible or otherwise. But in this fact that success depends, not upon absolute title, but upon *majus jus*, we may see one more trait of its ancient origin. It goes back to the time when the chief concern of the law was to adjudicate upon a dispute between litigants —when it had not as yet begun to analyse the conceptions of ownership and possession.[6]

We have seen that Magna Carta secured for lords of tenants their right to try actions begun by writ of right.[7] It thus preserved for centuries this piece of feudal jurisdiction. But, as we have seen, it had come to be of little value to these lords as early as Edward I.'s reign.[8] In fact, the procedure was too primitively cumbersome. This was recognized in a register of writs of the

to the king for the time, to the intent that if you find that the ancestor of John [the demandant] was not seised in the time that the demandant hath pleaded, you shall inquire no further upon the right; and, for this, you shall tell us whether the ancestor of John was seised in King Henry's time as he hath pleaded or not. . . . If Reynold had not tendered the half mark to inquire of the time, etc., then the Grand Assize ought to be charged only to inquire of the mere right, and not of the possession, etc.;" cp. Y.B. 20, 21 Ed. I. (R.S.) 292.

[1] Booth, Real Actions 94, 95; vol. ii 106; below 629, 630-631.

[2] Vol. i 309-310, and App. XXVII. [3] P. and M. ii 63.

[4] Booth, Real Actions 101, "Judgment after the *mise* joined binds all strangers that make not their claim within a year and a day: but this is to be after execution;" Y.B. 11, 12 Ed. III. (R.S.) 306.

[5] Below 90. [6] Vol. ii 79. [7] Above 6.

[8] Hengham, Magna c. 3, cited vol. i 59 n. 2; for a case of this sort which had been removed into the Bench see Y.B. 6, 7 Ed. II. (S.S.) 67-68.

early years of Edward I.'s reign;[1] and in 1338 the court admitted that the writ of right involved too much delay.[2] Newer remedies were invented which met all the ordinary needs of litigants; and these newer remedies were only available in the royal courts.[3] It was a rare case in which recourse to a writ of right was necessary.[4]

Finally it should be noted that the writ of right, in common with the other real actions, suffered from the neglect of the legislature to pass statutes of limitation. "Before 1237 claimants had been allowed to go back to a seisin on the day in 1135 when Henry I. died; then they were restricted to the day in 1154 when Henry II. was crowned; in 1275 the boundary was moved forward to the coronation of Richard I. in 1189, and there it remained during the rest of the middle ages."[5] The fact that it remained there so long was the decisive cause of the length of legal memory. Legal memory in the Middle Ages naturally refused to go behind the period of limitation fixed for the writ of right; but because it went back to this date in the Middle Ages it continued to do so, even after new statutes of limitation were passed.[6] And we shall see that this practice, traceable ultimately to the negligence of the legislature, has had a permanent influence on the law of prescription.[7]

(ii) The assize of novel disseisin.

I have already said something of the origin and purpose of the assize of novel disseisin.[8] Unlike the writ of right, which bears upon it the traces of a very primitive antiquity, it was a new royal remedy founded on positive ordinance. It was invented, not to decide which of two litigants had a better right to the property in dispute, but to protect the person who is seised or possessed of property; and not only will the person seised and disseised be restored to his seisin, but the disseisor will be punished.[9] "There can be no doubt that this action was suggested by the canonists' *actio spolii*, which itself had its origin in the Roman interdict *unde vi*. But when once adopted, English law very speedily made it her own. It soon became an exceedingly popular action. The plea rolls of Richard's reign and John's are covered with assizes of novel disseisin, many of which are brought by very humble persons and deal with minute parcels of land."[10] It was popular because it was both speedy and effective. It will be seen by a

[1] H.L.R. iii 215; vol. ii App. VD (14), "quia propter . . . discrimina brevis de recto vitandum ab omnibus consiliariis et justiciariis domini Regis."
[2] Y.B. 12, 13 Ed. III. (R.S.) 98.
[3] Y.B. 2, 3 Ed. II. (S.S.) 202 n. 1.
[4] P. and M. ii 70.
[5] Ibid 81.
[6] Bk. iv Pt. I. c. 2.
[7] Below 166; Bk. iv. Pt. II. c. 1 § 9.
[8] Vol. i 275, 329 and App. IIIA; see Maitland, Forms of Action 321-323.
[9] Eyre of Kent (S.S.) iii 138.
[10] P. and M. ii 47.

reference to the Appendix[1] that the question which the assize was to settle was formulated in the writ which called the assize together; there need not therefore be any pleading. There could be no vouching to warranty and no essoin; and it could be taken though the defendant made default in appearance. The assize, in fact, protected seisin—whether rightful or wrongful. It protected the man in possession from attack; and it restored a person disseised if he took proceedings at once.[2] But if the person disseised was on the land he must take such proceedings within four days.[3] Otherwise the disseisor was seised and the only remedy for the person disseised was, before the invention of the writs of entry, the writ of right.

Such was the assize of novel disseisin when it first made its appearance. But in course of time it gradually lost those characteristics of speediness and effectiveness which made it so useful a remedy in the twelfth and thirteenth centuries. In the first place, the growing elaboration of the law was giving to the terms of the question put to the jurors by the assize—Did B unjustly disseise A of his free tenement?—special and technical meanings.[4] This meant that the number of incidental questions of law or fact which must be answered before the main question was reached was growing, and that, therefore, a large scope was given to the new arts of the pleader; for, as we have seen, it had become possible to plead many "exceptiones;"[5] and these "exceptiones" might involve the decision of many questions of law by the court, or of fact by a jury into which the assize must be turned for this purpose.[6] In the second place, the maintenance of the assize as a remedy for the person seised—seised rightly or wrongly—required a large measure of the "lawyerly courage"[7] which will prevent hard cases from making bad law. The judges did not always possess this courage. They could not withstand the temptation of doing substantial justice. Consequently the scope

[1] Vol. i App. IIIA.

[2] P. and M. ii 52, "Besides serving as 'an interdict for the recovery of possession,' it will often serve as 'an interdict for the retention of possession.' To constitute an actionable disseisin a successful ejectment of the possessor is not indispensable; an unsuccessful attempt, a repelled invasion, will be enough."

[3] Vol. ii 263, 583; L.Q.R. iv 29—if he is away from the land a further reasonable time is allowed; "the reasonable time is in several cases determined by the parallel rules about essoins;" as to the four days Bracton, f. 163, says, "Quia si primo die rejicere non potuit, potest tamen in crastino vires resumere, arma congerere et auxilia amicorum invocare."

[4] Vol. ii 354; L.Q.R. iv 28; P. and M. ii 48, "The ideas answering to the terms 'injuste,' 'disseisivit,' 'libero tenemento' are being developed and defined, and it is becoming rather rash for laymen over whose heads an attaint is pending to swear that B has unjustly disseised A of his free tenement;" for the later developments of the law which centered round these conceptions see Bk. iv Pt. II. c. 1 § 2.

[5] Vol. ii 251; below 630-632; for illustrative cases see Y.BB. 4 Ed. II. (S.S.) 126-128; 5 Ed. II. (S.S.) (1312) 9-11.

[6] Vol. i 330-331.

[7] P. and M. ii 52.

of the assize was modified. In Bracton's day, if A disseised B and enfeoffed X, B could proceed against A and X, provided that A was still alive: A was punished for the disseisin; X must restore the land. But the assize did not lie either for the heir of the disseisee or against the heir of the disseisor, or, if the disseisor was dead, against his feoffee or disseisor.[1] But in allowing it under any circumstances against the disseisor's feoffee it is clear that the law was extending the scope of the assize. It not only protected actual seisin, but also enabled a person entitled to seisin to recover it. But its original scope and purpose was so far remembered that the question whether the disseisee could recover from the disseisor's feoffee depended upon the question whether the disseisor was alive or dead. It is clear that this will soon appear to be a very arbitrary limitation. In the third place, this tendency to introduce considerations of title was strengthened by two other circumstances. (1) The great usefulness of the assize induced the legislator to extend still further its capacity to protect the owner. The Statute of Westminster II. enabled it to be used by an owner against a tenant for years and a guardian who had aliened in fee, and also against their feoffees.[2] Here, again, therefore, a plaintiff could recover on the strength of his title against a person who had got peaceable seisin. (2) The period of limitation, i.e. the time within which the assize must be brought, gradually lengthened. Short periods of limitation were at first fixed by royal ordinance. These periods gradually ceased to be fixed.[3] 1242 was the date fixed by the Statute of Westminster I.;[4] and 1242 the date remained till the year 1540.[5] "If," says Maitland, "I be permitted to demand restitution of land on the ground that you ejected me eighty or even twenty years ago, whatever we may call this complaint, it will be difficult to think of it as other than a demand that you should restore to me what is mine, difficult to think of it as based not on proprietary right, but on injured possession, and difficult because substantially unjust to prevent your pleading whatever title you may have."[6] Thus we are not surprised to find that the plaintiff in the assize gradually relied more and more on title.[7] The cases in which

[1] P. and M. ii 55—we may note that if A had enfeoffed X during the time allowed to B for self-help, both A and X could be punished as disseisors.

[2] 13 Ed. I. st. 1 c. 6, "In case also when any holding for term of years or in ward alieneth the same in fee and by such alienation the freehold is transferred to the feoffee, the remedy shall be by writ of *Novel Disseisin*, and as well the feoffor, as the feoffee shall be had for disseisors, so that during the life of any of them the said writ shall hold place." In Bracton's day these cases were met by writs of entry, P. and M. ii 54 n. 1; Y.B. 3, 4 Ed. II. (S.S.) 112, 113.

[3] P. and M. ii 50, 51.

[4] 3 Edward I. st. 1 c. 39.

[5] 32 Henry VIII. c. 2.

[6] L.Q.R. iv 293.

[7] See the cases cited by Maitland from the Y.BB. of Edward I. and III., L.Q.R. iv 287-289; as he says, they show that the requirement of title is growing more

the true owner could not recover by its means on the strength of his title became fewer and fewer; and those which remained—the cases of Descents Cast and Discontinuances [1]—soon began to be regarded as anomalies.

The result was fatal to the assize of novel disseisin. More and more scope was allowed to the subtleties of pleaders endeavouring to evade the main question to be decided by raising points of law or incidental questions of fact.[2] "And so the assize falls into the ruck of the real actions." [3]

Before passing from the assize of novel disseisin to the newer forms of action which took its place, we must glance at the *Assize of Nuisance*, which was, in a manner, supplementary to it. It lay, says Fitzherbert,[4] "where a man levieth a nuisance to my freehold which I have for my life, in tail, or in fee simple." The novel disseisin was directed to secure an undisturbed possession: the assize of nuisance to secure its free enjoyment.[5] Being a real action it only lay for or against freeholders who had suffered by or who had caused the nuisance.[6] For a more general remedy against other persons unconnected with the land there was no remedy till the rise of actions of trespass on the case.[7]

(iii) The writs of Entry sur disseisin.

These writs of Entry begin, like the *Præcipe in capite*, with the words "Præcipe quod reddat;" but they do not leave at large, as between the parties, the question of better right. They go on

stringent; cp. the Eyre of Kent (S.S.) ii 192-193; iii 143-144; Y.B. 8 Ed. II. (S.S.) 29 *per* Bereford, C.J.

[1] Vol. ii 585-586.

[2] See e.g. Y.BB. 5 Ed. II. (S.S.) (1312) 112-113; 20 Ed. III. (R.S.) ii 128-138; 12 Rich. II. 114-115.

[3] L.Q.R. iv 295, "The formulation in the original writ of the question for the jurors was a device only suitable to an age whose law was as yet but meagre. As such terms as 'freehold' and 'disseisin' become more and more technical, the pleader of one litigant becomes more and more anxious that the question so formulated shall not be answered, and the justices take that pleader's side, for they hold that matter of law is for the court and only purest fact for the laymen. The pleadings in assizes become at least as complicated and as colourable, because there is a fixed question for the jurors which has to be evaded. And so the assizes fall into the ruck of the real actions."

[4] F.N.B. 183I-184B; for the writ see Bracton f. 233; for another specimen see Eynsham Cart. i no. 504.

[5] P. and M. ii 53. A writ which was directed to a somewhat similar object is the *Curia Claudenda;* "This writ," says Booth (Real Actions 242), "lies for him who is tenant for life, or has other estate of freehold in land, and he who has land next adjoining, ought to inclose his land and will not, to the nuisance of the plaintiff."

[6] Y.B. 20 Ed. III. (R.S.) ii 148-150; F.N.B. 185 G.; Bl. Comm. ii 222; the scope of the assize was slightly extended by the celebrated clause 24 of the Stat. West. II. which empowered the issue of writs on the case—indeed, the narrow scope of the assize is given as an illustration of the kind of evil the statute was meant to remedy; for the effect upon substantive law of this limitation in the scope of the assize see below 156-157.

[7] Below 28.

to suggest that the tenant, or his predecessors in title, "had no entry into the land claimed" except by some means stated in the writ, which means will give no right to the land. The question to be tried, therefore, is limited to the question, Did or did not the tenant come to the possession of the land in the manner suggested by the demandant?

Though these writs do not appear in Glanvil's book, we can see an approach to them in the writ provided for the debtor, who, having gaged his land to a creditor for a term of years, wishes to redeem it. The writ commands N that he restore to R certain land, which R gaged to N for 100 marks for a term which has elapsed, and that he (N) receive his money.[1] As Maitland has pointed out[2] this is a writ *Præcipe* for land, assigning as a special reason why the tenant should restore, the fact that the term has expired. "The change of a few words would turn the writ now before us into one of the commonest of the writs of entry, the writ of entry ad terminum qui præteriit. Here is the first germ of a great institution."[3] The institution was not long in making its appearance; for some of these writs are known in the first years of the thirteenth century.[4]

The reason for the invention of these writs is to be found primarily in the cumbersome character of the writ of right and the limitations of the original scope of the novel disseisin. It was felt to be hard to drive a man, who might perhaps have a recent and long-continued seisin on his side, to prove his title by means of a writ of right.[5] He was allowed, therefore, to suggest a particular fault in the tenant's title, and to recover if he could show that the tenant entered by the faulty title suggested. This being the reason for the invention of these writs, we are not surprised to find that some of the earliest of them are the "writs of entry sur disseisin." At first perhaps they were only allowed where either disseisor or disseisee had died pending the trial of the assize;[6]

[1] "Precipe N quod juste et sine dilatione reddat R totam terram, vel terram illam in illa villa, quam ei invadiavit pro centum marcis ad terminum qui preteriit ut dicit, et denarios suos idem recipiat," Glanvil x 9.

[2] Forms of Action 333. [3] Ibid.

[4] Vol. ii 193; P. and M. ii 64; a writ of entry for the disseisee against the heir of the disseisor was made a writ of course in 1205, Rot. Cl. John 32, cited P. and M. loc. cit. n. 1; in the Eyre of Kent (S.S.) iii 41 Spigurnel, J., puts the converse case of a writ of entry for the heir of the disseisee against the disseisor; for specimens see App. Ia (1).

[5] For a similar development based on similar reasons in the canon law see P. and M. ii 66.

[6] Bracton, f. 219b, puts the following clause in the writ, "Et unde assisa novæ disseisinæ summonita fuit coram justiciariis nostris ad primam, etc., et visus terræ captus, et remansit assisa capienda eo quod prædictus C. obiit ante captionem illius assisæ;" but ibid 218b he says, "In omni casu tenet, sive incepta fuerit in vita antecessoris sive non et quoad restitutionem, et secundum quosdam tenet quoad pœnam, si assisa fuerit incepta, et quoad restitutionem, et aliter non"—the law was clearly in an uncertain state; and cp. Y.B. 3, 4 Ed. II. (S.S.) 112 *per* Herle.

but this soon ceased to be a condition of obtaining them. Indeed, the justice and expediency of limiting in some way the enquiry as to better right was obvious; and, as we have seen, the right to get this advantage by the tender of the demi mark was even admitted in the writ of right itself.[1]

Once having allowed the principle of these writs, two questions naturally arise. (1) Can the disseisee or any of his heirs sue? (2) Can the tenant be sued if a faulty entry by any of his predecessors in title at any distance of time in the past be suggested? The first question was answered in the affirmative from the early years of the thirteenth century.[2] The second question was answered in the negative until the Statute of Marlborough (1267).[3] Before 1267 the demandant might suggest that the tenant had no entry save *per* A, which A had disseised the demandant or his ancestors (*writ of entry in the per*); or he might suggest that the tenant had no entry save *per* A to whom (*cui*) B demised the land, which B had disseised the demandant or his ancestors (*writ of entry in the per and cui*). It was only "within these degrees" that a writ of entry lay.[4] But there was no logical reason for this limitation, and perhaps no legal reason. Probably the reason was political. All these writs of entry began, as we have seen, with the words "Præcipe quod reddat;" and Magna Carta had conceded to the feudal lords that the writ Præcipe should not issue so that a man shall lose his court.[5] It is true that the clause in the Charter was probably directed to the præcipe in capite; but it is equally clear that if the demandant was allowed to allege a flaw in the tenant's title, at any period however remote, in a form of action which could only be brought in the king's court, the clause in the Charter would be rendered nugatory. In 1267, however, the king was again master in his realm; and in that year the view for which Bracton had argued[6] became law. A demandant was allowed to bring *the writ of entry in the post;* that is, he could allege that the tenant had no entry save after (*post*) a disseisin that one A had committed against the demandant or some one of his ancestors.[7] In other words, the writ was allowed to be

[1] Above 6. [2] P. and M. ii 64, 70. [3] 52 Henry III. c. 29.

[4] P. and M. ii 64, 65; App. Ia (1); Bracton f. 219b; it is suggested ibid f. 318 that the limit originated in the fact that the entry should be proved by the testimony of living witnesses, "non enim excedit tertium gradum nec tempus quod excedit testimonium de visu et auditu;" 318b—so the writ of entry may be turned into a writ of right "propter longissimum ingressum;" below 14 n. 2.

[5] (1215) c. 34; vol. i 58-59; above 6.

[6] f. 219b, "Et si hujusmodi tenementum ulterius quam ad tertiam personam translatum non fuerit, locum non habebit breve de ingressu, nisi sit qui dicat quod sine mentione de ingressu fieri possit breve hoc modo."

[7] 52 Henry III. c. 29, "Habeat conquerens breve de recuperanda seisina sine mencione graduum, ad cujuscunque manus per hujusmodi alienaciones res illa devenerit, per brevia originalia per consilium domini Regis providenda;" as Maitland

brought "out of the degrees;" and when the writ was so brought there was no need to show how the land had passed from A the disseisor to the tenant.

It is clear that these writs of entry occupy a middle position between the summary possessory remedy of the novel disseisin and the lengthy proprietary remedy of the writ of right. It is clear too that, as between the various writs of entry, some partake rather of the nature of possessory, some of the nature of proprietary remedies. Bracton is not quite clear in his own mind as to their nature. He sometimes speaks of them as if they were merely supplementary to the assize of novel disseisin;[1] but he admits that other species of writs of entry are proprietary; and some of them have such close affinity with the writ of right that they can be turned into a writ of right by the pleading of the parties to the action.[2] This double aspect—partly possessory, partly proprietary—they retained to the end.[3]

The popularity of these writs was due to the flexibility of the principle upon which they were based. New writs could easily be formed on this model to protect the various rights recognized in the land. Though the older remedies survived, and were sometimes used, their work and sphere were for the most part usurped by writs of entry of one sort or another. A writ of entry in the post could do most of the work of the writ of right, and a writ of entry in the nature of an assize[4] came in practice to be substituted for the assize of novel disseisin. In fact, the various writs of entry were, during this period, made to do for the land law what the various developments of the writs of trespass and deceit were made to do for the law of tort,[5] because, in both cases, the flexibility of the form of action made it capable of the most diverse applications.

has said, Forms of Action 336, "the Statute of Marlborough, which in many ways marks the end of feudalism, in effect abolished the restrictions on the formation of writs of entry—but it only did this by adding to their number;" apparently a writ in the post was abateable if a writ within the degrees could have been brought, Y.B. 6 Ed. II. (S.S.) i 61.

[1] f. 220, "Tale breve de ingressu naturam sapit assisæ novæ disseisinæ ad omnia quoad restitutionem licet non quoad pœnam."

[2] f. 318b, "Nisi breve de ingressu per narrationem vertatur in breve de recto, propter longissimum ingressum, qui probari non poterit per visum proprium alicujus et auditum sed alienum;" this doctrine became obsolete, P. and M. ii 74 n. 2. Was this owing to the invention of writs of entry in the post? The entry in such a writ could not be proved per visum et auditum proprium.

[3] Y.BB. 33-35 Ed. I. (R.S) 421; 3 Ed. II. (S.S.) 160, "I wish all of ycu to understand that no writ of entry is a writ of right, but it lies in the possession coloured by right; for that only is a writ of right which takes issue in the right," *per* Bereford, C.J.

[4] F.N.B. 191C-192F; Booth, Real Actions 174 seqq. It is sometimes called a writ of entry in the Quibus, and as Booth says, 172, "differs not from an assize of novel disseisin in the cause of action, but in the proceedings and process;" for a case in which such a writ was brought see Y.B. 12 Rich. II. 172.

[5] Vol. ii 455-456; below 350-351, 429-451.

The other Real Actions

We must now consider the other real actions which protected the diverse interests which various persons might have in the land. It would be impossible to describe them all in detail; but, as I have said, their enumeration will serve as a useful guide to the mediæval land law regarded from the mediæval point of view. In thus enumerating them I shall divide them into the following groups:—

(i) The actions which lie as between lord and tenant.
(ii) The actions which lie to protect the lord or tenant of particular estates in the land.
(iii) The actions which lie to protect incorporeal rights.
(iv) The action which lies to assert the right to a villein.
(v) The actions which arise out of certain family relationships.
(vi) The actions which arise out of the incapacity of persons.
(vii) The actions concerning ecclesiastical property.
(viii) The actions which deal with abuse of the process of the court.

In the various forms of action falling within these groups we can see the various stages in the development of the real actions. There are the actions which fall within the writ of right group, e.g. the ne injuste vexes, and the writ of right of dower. There are actions which belong to the possessory assize group, e.g. the assize of mort d'ancestor, and darrein presentment. The most numerous class of actions are those begun by writs of entry, in the *per*, *cui*, and *post*, devised to protect the many new relations which gradually came into being with the growing elaboration of the law.

(i) The actions which lie as between lord and tenant.

Ne injuste vexes.[1] This writ lay where the tenant and his ancestors held the land of the lord and his ancestors by certain services, and the lord, by the hand of his tenant, got seisin of more or greater services and distrained for them; in such a case the tenant by this writ could assert his freedom from such services.

De consuetudinibus et serviciis.[2] This writ lay for the lord against the tenant who withheld his due services. It is a writ

[1] Booth, Real Actions 126, 127; cp. Y.B. 3, 4 Ed. II. (S.S.) *per* Scrope, J., for various alternative remedies; for the cases in which the lord might use an assize of novel disseisin, or mort d'ancestor, or a writ of right sur disclaimer see Bl. Comm. iii 232, 233.

[2] Booth, Real Actions 132; cp. Y.BB. 1, 2 Ed. II. (S.S.) 116; 11, 12 Ed. III. (R.S.) 198; App. Ia (4).

of right in its nature—in the *debet* and *solet* when the lord counts of his own seisin; in the *debet* when he counts of the seisin of his ancestor. Being a writ of right in its nature, the procedure upon it was slow and cumbrous. The lord, if successful, established his title to the services, and could distrain for them; but he could not regain possession of the land. If there was nothing on the land to be distrained it was a remedy of small value.[1] In fact, after the decay of the feudal courts, the lord had no effective remedy against a tenant who left his services unperformed and his land uncultivated. In such a case a remedy was required by which the lord could regain possession of the land itself.[2] Such a remedy he obtained by means of the writ of *Cessavit.*

Cessavit.[3] This writ was introduced by the Statutes of Gloucester (1278) and Westminster II. (1285)[4] in order to enable the lord to get the land itself in default of the due performance of the services. It was derived, through the canon law, from Justinian's legislation.[5] But Miss Bateson has shown that the action differs from the Roman model, and resembles the rules laid down in some of the borough customs in its requirements (1) that the land must have lain fresh for two years; (2) that there must be no distrainable goods on the land; and (3) that the landlord must have got judgment.[6] According to Roman law it was only necessary that the rent should be in arrear for the required period. Probably here as in other cases a Roman idea has been naturalized and adapted to native requirements. The writ could be brought in the *per*, *cui*, or *post.*

Mesne.[7] This writ lay where there was lord, mesne, and tenant, and the mesne did not perform his services, so that chattels on the land held by the tenant were distrained. The tenant recovered damages from the mesne, and got judgment that the mesne acquit him by performing his services.

Warrantia Cartæ.[8] This writ lay against the feoffor or his heirs where a man was enfeoffed by deed with warranty, and was impleaded in an action (e.g. an assize) in which he could not vouch to warranty. There were also other remedies for breach of warranty of which I shall speak later.[9]

Escheat.[10] The lord had this writ to recover the land when his tenant in fee simple died without heirs.

[1] P. and M. i 333. [2] Ibid i 335.
[3] Booth, Real Actions 133; Y.B. 11, 12 Ed. III. (R.S.) 196; App. Ia (6).
[4] 6 Edward I. c. 4; 13 Edward I. st. 1 c. 21.
[5] P. and M. i 334 n. 2; Bl. Comm. iii 334.
[6] Borough Customs (S.S.) ii lxiv.
[7] Booth, Real Actions 136; for instances see Y.BB. 3, 4 Ed. II. (S.S.) 130; 4 Ed. II. (S.S.) 71; App. Ia (3).
[8] Booth, Real Actions 240. [9] Below 159-161.
[10] Booth, Real Actions, 135.

De Recto Custodiæ terræ et heredis.[1] This was a writ of right by which the lord could assert his right to the wardship of the land and of the body of the infant heir.

Of the remedies for waste I shall speak later ;[2] and with the action of replevin which arose out of the lord's right of distraint I shall deal with when I come to the subject of self-help.[3]

(ii) The actions which lie to protect the lord or tenant of particular estates in the land.

Estates tail.

The writ of Formedon (*forma doni*), though originally regarded as being possessory in character,[4] came to be regarded as so distinctly proprietary that it was called the writ of right for the tenant in tail.[5] In the developed common law there were three varieties of the writ. *Formedon in reverter.* This variety of the writ could be brought by the donor or his heirs when the issue of the donee in tail failed. *Formedon in descender.* This variety of the writ could be brought by the issue in tail against the alienee or disseisor of the donee in tail after the death of such donee. *Formedon in remainder.* If the tenant in tail alienated, or was disseised, and died without issue, the remainder-man had this writ to recover the land.[6] The question whether some or all of these writs were known to the common law before the passing of the Statute de Donis Conditionalibus (1285),[7] or whether, like the estate tail, they were created by this statute, has been the subject of some controversy. It seems to me that this controversy can only be settled by considering the object with which the Statute de Donis was passed. We shall see[8] that before this statute a gift to a man and the heirs of his body created a fee simple conditional. It was a gift to a man and his heirs conditionally upon the birth of issue. Hence if no issue was born, the condition was not fulfilled, and the donor could recover the land ; but, if issue was born, the condition was fulfilled, and the donee got in substance a fee simple, which he could alienate as he pleased. If, however, he did not alienate, and died without issue, the estate reverted,

[1] Booth, Real Actions 132 ; for the writs of ejectment and ravishment of ward (20 Henry III. c. 6; 13 Edward I. st. 1 c. 35) see F.N.B. 139I-140G ; Reeves, H.E.L. ii 117, 118; Y.BB. 33-35 Ed. I (R.S.) 174; 13, 14 Ed. III. (R.S.) 146; 17, 18 Ed. III. (R.S.) 392; they are writs in the nature of trespass, and they are an early, probably the earliest, instance in which such a writ was employed to protect rights for which there was a real action, below 27; it was the easier to protect these rights in this way because they were regarded as chattels, below 215.

[2] Below 121-123.

[3] Below 283-287.

[4] Y.B. 1, 2 Ed. II. (S.S.) 159.

[5] Booth, Real Actions 139; App. Ia (2).

[6] Co. Litt. 326b.

[7] 13 Edward I. c. 1, Stat. Westminster II.

[8] Below 111-114; cf. vol. ii 349-350.

just as if no issue had been born. This being the case, it is not surprising to find that there is a practically universal consensus of opinion that the first form of the writ—the *formedon in reverter* existed at common law.[1] On the other hand, it seems to me that the weight of the evidence is in favour of the view that the *formedon in descender* was introduced by the statute. Before the statute the issue had no remedy if his ancestor alienated; and one of the objects of the statute was to give him a remedy in such a case.[2] It is true that if his ancestor was disseised he had a remedy; but it was probably not by writ of formedon, but by assize of mort d'ancestor.[3] This, it seems to me, is the view of the law accepted in the Year Books; and, having regard to the words and scope of the statute, the view which is a priori the most probable. The writ of *formedon in remainder* is not given by the statute; nor is there any positive evidence that it existed at common law. Estates in remainder were certainly limited to take effect after conditional fees;[4] but as yet we have no evidence that any writ was devised for their protection.[5] However that may be, it is quite clear that such a writ was introduced shortly after the passing of the Statute de Donis.[6]

[1] "Breve per quod donator habet recuperare suum, deficiente exitu satis est in usu in cancellaria," 13 Edward I. c. 1; cf. Y.BB. 1, 2 Ed. II. (S.S.) 3; 3, 4 Ed. II. (S.S.) 41; 8 Ed. II. (S.S.) 60; 18, 19 Ed. III. (R.S.) 202; Willion v. Berkeley (1561) Plowden at p. 235; Coke, Second Instit. 336; Booth, Real Actions 140; Challis, Real Property (3rd ed.) 84; according to one not improbable view, Plowden at p. 247, cited below 115 n. 4, it did not lie after three descents from the donee; see below 115 for an explanation of this view. It would seem, however, that before De Donis the donor's right was not a reversion, but merely a possibility of reverter, below 68 n. 5.

[2] "Et quia in novo casu novum remedium est apponendum fiat impetranti tale breve"—then follows the writ, 13 Edward I. c. 1.

[3] Y.BB. 3, 4 Ed. II. (S.S.) 112-113; 2 Rich. II. 48-49; Willion v. Berkeley (1561) Plowden at p. 239; Coke, Second Instit. 336; Booth, Real Actions 140. On the other hand, the existence of the writ at common law is thought to be probable by Maitland from a consideration of a MS. register of writs of Edward I.'s reign, cited vol. ii 615 App. Vd note 4; and this view is supported by Co. Litt. 19a; an intermediate opinion is that of Serjeant Bendloe who thought that a formedon in descender lay at common law where an assize would not serve the issue; thus if a man married a first wife and had a son, and he then married a second wife and land was given to him and the heirs of his body by the second wife, and he had a son by her—then, as the assize would not meet the case of the son by the second wife, because he was not heir, this son had a formedon in descender, Plowden at p. 239; but there is no evidence that such a writ was ever brought before the statute in such a case.

[4] P. and M. ii 23-25; Maitland, Remainders after Conditional Fees, Coll. Papers ii 174; Challis's reply to this paper will be found in his Real Property (3rd ed.) App. II.

[5] Co. Litt. 280b; Booth, Real Actions 151, says, "This writ is partly grounded upon the equity of the Statute de Donis Conditionalibus;" it is true that Bracton, f. 69, says that there was such a writ, and that he will give it, but he fails to do so; see P. and M. ii 24.

[6] It is mentioned in Y.B. 33-35 Ed. I. (R.S.) 20; and there is a case turning on such a writ in Y.B. 1, 2 Ed. II. (S.S.) 166-168.

Estates for life.

Intrusion.[1] This was a writ of entry (in the *per, cui* or *post*) which lay for the reversioner when the tenant for life, in dower, or by the curtesy died seised, and after his death one intruded upon the land.

Entry ad communem legem.[2] This was a writ of entry (in the *per, cui* or *post*) which lay for the reversioner after the death of the tenant for life, in dower, or by the curtesy when such tenant had aliened.

Entry in casu proviso.[3] This was a writ of entry (in the *per, cui* or *post*) given by the Statute of Gloucester (1278). It lay when the tenant in dower aliened in fee, in tail, or for life; and by it the reversioner could recover the land even during the life of the tenant in dower. "The statute," said Bereford, C.J., "was provided to supply a deficiency in the common law; for under the common law there could have been no recovery during A's [the tenant's] lifetime; and the statute was made in remedy of that hardship."[4]

Entry in consimili casu.[5] By the Statute of Westminster II. (1285) the last mentioned writ was extended to the cases of the tenant for life and tenant by curtesy.

Estates for life or years.

Ad terminum qui præteriit.[6] This was a writ of entry (in the *per, cui*, or *post*) which lay for the lessor or his heirs, when such lessor had leased for life or years, and the lessee, after the termination of the lease, held on, or where a stranger entered, so that the land was detained from the lessor or his heirs.

Estates held in Common.

Partitione Facienda.[7] This writ lay at common law for coparceners (whether at common law or under the custom of gavelkind) to compel a division of the land. It was not extended to tenants in common and joint tenants till Henry VIII.'s reign.[8]

(iii) The actions which lie to protect incorporeal rights.

The Assize of novel disseisin lay if a man were disturbed in his possession of certain incorporeal things, such as rents or

[1] Booth, Real Actions 181. [2] Ibid. 190; Y.B. 3, 4 Ed. II. (S.S.) 22, 23.
[3] Booth, Real Actions 197; 6 Edward I. c. 7; Y.B. 3 Ed. II. (S.S.) 16.
[4] Y.B. 6, 7 Ed. II. (S.S.) 60; see ibid. xxi-xxiii for the manner in which the writ was used instead of a formedon in order to avoid being barred by the ancestor's warranty; as to this effect of warranty, see below 117-118.
[5] Booth, Real Actions 199; 13 Edward I. st. 1 c. 24; Y.B. 17, 18 Ed. III. (R.S.) 440 seqq.
[6] Booth, Real Actions 195; for the evolution of the writ see P. and M. ii 68, n. 2.
[7] Booth, Real Actions 244; Litt. § 247.
[8] 31 Henry VIII. c. 1; 32 Henry VIII. c. 32.

rights of common.[1] Its scope in this direction was extended by the Statute of Westminister II.[2]

Quod Permittat.[3] This was a writ which might be in the nature either of a writ of right or of a writ of entry. It lay for the disturbance of rights of common or other incorporeal rights; and could be brought by the heir of the disseisee against the disseisor, his heir, or feoffee. In some cases the question whether it or a Præcipe quod reddat was the appropriate writ gave rise to controversy;[4] and in other cases it was coextensive with the assize of novel disseisin as extended by the Statute of Westminster II. Its scope was extended to remedy many various nuisances to incorporeal hereditaments by the provision of c. 24 of the same statute, which permitted the making of writs in consimili casu.

Quo Jure.[5] This writ lay for a tenant seised in fee simple against one who claimed common over his land.

Secta ad Molendinum.[6] This writ lay for a man to whose mill another owed suit, if that suit were withdrawn.

(iv) The action which lies to assert the right to a villein.

Nativo habendo.[7] This was a writ directed to the sheriff ordering him to deliver to the lord his villein who has run away from his manor. The villein could, before 1350,[8] stop all proceedings on this writ, till the itinerant justices came into the county, by suing out the writ *de libertate probanda.*[9]

(v) The actions which arise out of certain family relationships.

Husband and wife.

The writs connected with dower. The law provided several writs to enable a woman to recover her dower.[10] The first of these writs is the *Writ of right of dower.*[11] This was a writ of right patent directed to the heir of the husband ordering him to do the wife right in his court.[12] But, because it was a writ of right patent triable in the lord's court, it came in course of time to be

[1] P. and M. ii 130, 131, 139. [2] 13 Edward I. st. 1 c. 25.
[3] Booth, Real Actions 237; F.N.B. 123F-125A; App. Ia (7).
[4] The Eyre of Kent ii 131, 132, 133, 134, 135, 136; it seems to have been thought that if the disturber of the right was the owner of the soil of the servient tenement this writ lay; and if the disturber was a stranger a Præcipe quod reddat lay.
[5] Booth, Real Actions 129.
[6] Ibid 137; see Y.B. 12, 13 Ed. III. (R.S.) 122 for a specimen.
[7] Booth, Real Actions 127; App. Ia (16).
[8] 25 Edward III. c. 18. [9] Booth, Real Actions 128; App. Ia (17).
[10] For the law as to dower, see below 189-197.
[11] Glanvil vi 5; Booth, Real Actions 118; Maitland, Forms of Action 330.
[12] If he had no court the writ was directed to the sheriff and was returnable in the Common Pleas, Booth, op. cit. 118.

superseded by the *writ of dower unde nihil habet.*[1] This was a writ of right brought in the king's court; and, as its name implies, only lay when the woman had received no part of her dower. The explanation given by Bracton[2] of the reason why the action lay in the king's court in such a case is as follows:— It is possible that the widow has not got any part of her dower because the heir denies that she was married. But this question, being a matter of ecclesiastical law, can only be tried by the bishop; and the bishop can only be compelled to certify as to this by the king's court.[3] "It follows that if there is any chance of a denial of the marriage the widow must go to the king's court."[4] Because this writ lay in the king's court it eventually superseded the *writ of right of dower*, "wherein sometime great delays are used."[5] Booth speaks of it as the "ordinary writ," and explains that generally, when a wife sues for dower, she has no part of her dower assigned to her.[6] The writ of *Admeasurement of dower* lay when "the heir when he is within age endoweth the wife of more than she ought to have dower of: or if the guardian endow the wife of more than the third part of the land of which she ought to have dower."[7] In these cases the heir, when he attained his full age, could sue for admeasurement, and the restoration of the surplus. As the result of a judgment in a writ of dower the widow could not enter, but she must get a writ to the sheriff to assign her dower;[8] and, in a writ of dower *unde nihil habet*, the statute of Merton gave her damages against the heir for its detention;[9] but her right to damages was lost if the heir died before they were assessed.[10]

The inconvenience of this procedure for the recovery of dower induced the court of Chancery to interfere in the eighteenth century.[11] That court not only gave a better remedy, but actually enlarged the scope of the widow's right. It gave her a third of the rents and profits from the date of her husband's death till

[1] Glanvil vi 15; Booth, Real Actions 166; Bl. Comm. iii 183; Maitland, Forms of Action 330-331; App. Ia (10).

[2] Ff. 106, 296b.

[3] See vol. i 121.

[4] Maitland, Forms of Action 331.

[5] Co. Litt. 32b.

[6] "This writ is of little use or practice because of the ordinary writ of dower (unde nihil habet); for ordinarily now the wife has no part of her dower assigned to her when she sues for dower, and unless she have some part of her dower in the same town, and of the same person, and sues for the residue, she needs not bring a right of dower, but the other, unde nihil habet," Booth, Real Actions 118; and see 3 Edward I. st. 1 c. 49.

[7] F.N.B. 148F; Bracton ff. 314-315.

[8] Co. Litt. 34b.

[9] Ibid 32b; 20 Henry III. c. 1.

[10] Williams v. Thomas [1909] 1 Ch. at p. 720; cf. Fitz., Ab. *Damages* pl. 119.

[11] See the judgment of Cozens-Hardy, M.R., in Williams v. Thomas at pp. 720-723; apparently Somers, L.C., refused to give any relief to a dowress in 1699, 2 Eq. Cas. Ab. 386; but Cowper, L.C., in 1710 allowed a dowress a third of the profits before the assignment of dower, ibid. 386-387.

dower was assigned, not only as against the heir, but also, if the the heir was dead, against his representatives. Thus the widow got in equity "two distinct rights, namely first a right to one third of the rents and profits from the death, and next a right to have dower assigned to her;"[1] and her right of action to get an assignment, though it may be barred by laches, does not fall within the Real Property Limitation Act.[2]

Cui in vita.[3] This was a writ of entry (in the *per*, *cui*, or *post*) which could be brought by the wife, after her husband's death, to recover the wife's freehold aliened by the husband. If the wife died before she brought this writ, the heir had a writ of entry *sur cui in vita* if the estate was in fee simple: a *formedon* if the estate was an estate tail.

Cui ante divortium.[4] This was like a *cui in vita*, substituting the divorce for the death of the husband.

Causa matrimonii prælocuti.[5] This was a writ of entry (in the *per*, *cui*, or *post*) which lay to enable a woman to recover land from a man to whom she had given it in consideration of a contemplated marriage with him, which had not taken place.

Ancestor and heir.

The three different varieties of the real actions—the writ of right, the assizes, and writs analogous to the writs of entry in that they extend the scope of the assize—can be seen in the actions provided to protect the interests of the heir.

The writs of right. (*a*) If there were two claimants to the estate, both of whom claimed to be descended from the same ancestor, and the rival pedigrees were not disputed, the matter was tried by writ of right as a pure question of law on the pleadings. There was neither battle nor the grand assize.[6] (*b*) The writ of right *de rationabili parte.*[7] If an ancestor seised in fee simple made a lease for life and died, and afterwards the lessee died, and then one of two or more coparceners deforced the other or others, they could bring this writ to recover their share. As in case (*a*) the question was tried on the pleadings. (*c*) *Nuper obiit.*[8] This writ was not properly a

[1] Williams v. Thomas [1909] 1 Ch. at p. 721.

[2] "In my opinion the statute applies to an action at law or suit in equity to gain possession of a definite piece of land as distinguished from a proceeding to obtain a delimitation of parcels under which for the first time a title to a definite piece of land will be obtained," ibid. at p. 722 *per* Cozens-Hardy, M.R.

[3] Booth, Real Actions 185; for the evolution of this writ see P. and M. ii 68 n. 2, and Y.B. 20 Ed. III. (R.S.) i 428 *per* Hillary, J.; App. Ia (8).

[4] Booth, Real Actions 188.

[5] Ibid 197; vol. ii 594 n. 1; Y.BB. 1, 2 Ed. II. (S.S.) 32-34; 13, 14 Ed. III (R.S.) 226.

[6] P. and M. ii 61.

[7] Booth, Real Actions 119.

[8] Ibid 204; for cases which illustrate its scope see the Eyre of Kent (S.S.) iii 147-151, 153-159.

writ of right at all. But, as Booth says, it had great affinity with the last-mentioned writ. Both lay for the recovery of land by one coparcener against another. The difference was that the writ of right *de rationabili parte* might be brought if the ancestor was seised at any time, whereas for the purpose of this writ the ancestor must have died seised.

The assize of mort d'ancestor. I have already said something of the scope of the assize of mort d'ancestor.[1] The assize was summoned to answer the following definite questions—"the points of the assize": (1) Was A seised in his demesne as of fee on the day on which he died? (2) Did he die within the period of limitation allowed by the writ? (3) Is the claimant A's nearest heir?[2] The need for this assize arose because, as Maitland has pointed out, "seisin is not conceived of as a descendible right."[3] In the age of Bracton the law did not, as in the days of Littleton,[4] attribute a seisin in law to the heir.[5] Seisin had not in the former period acquired that connotation of title which it was acquiring in the latter.[6] If the law had conceived of seisin as a descendible right "there would have been no place for the mort d'ancestor, for its sphere would have been covered by the novel disseisin."[7] The assize did not lie in respect of lands which were devisable.[8] It followed that when, as the result of the legislation of Henry VIII.'s and Charles II.'s reigns, all land became devisable, this remedy became obsolete.[9]

Extensions of the assize. The assize of mort d'ancestor lay not only against the original abator, but against anyone holding the land however remotely, from that abator;[10] but it could only be brought by the father, mother, brother, sister, uncle, aunt, nephew, or niece of the deceased ancestor.[11] The reason for this limitation was probably the same as the reason for which the scope of the writs of entry were formerly limited—an extension would have taken business from the feudal lords and their courts.[12] These lords do not seem to have objected

[1] Vol. i 275-276, 329; P. and M. ii 56-62.
[2] Booth, Real Actions 207.
[3] Forms of Action 324; P. and M. ii 59.
[4] § 448; Bk. iv Pt. II. c. 1 § 2.
[5] P. and M. ii 60.
[6] Above 10; vol. ii 354, 584.
[7] Forms of Action 324; P. and M. ii 59.
[8] "If the tenements be devisable the mort d'ancestor does not lie, and I will tell you why. In respect of devisable tenements the demandant may aver the points of his writ . . . yet, though he have all the points, he cannot recover against the devisee; wherefore the mort d'ancestor does not lie," the Eyre of Kent (S.S.) iii 42 *per* Spigurnel, J.; but this did not apply to the other ancestral writs aiel, besaiel, and cosinage, Y.B. 3 Ed. II. (S.S.) 198-199.
[9] Bl. Comm. iii 187.
[10] P. and M. ii 61.
[11] Booth, Real Actions 206; P. and M. ii 56.
[12] Above 13; Maitland, Forms of Action 325.

to its extension by means of the writs of *Aiel* and *Besaiel*,[1] by means of which heir got a remedy when the deceased was his grandfather or great-grandfather. But they did object to the writ of *Cosinage*[3] by means of which the heir got a remedy where the deceased was his collateral relative, however remotely related; and, in support of their objection, they contended that such an extension was contrary to the clause of Magna Carta which limited the right to issue the writ Præcipe.[2] Bracton argued that this extension was no infringement; and the writ was upheld.[3] Thus we get a set of writs of entry which were supplementary to the assize of mort d'ancestor in the same manner as the writs of entry sur disseisin were supplementary to the assize of novel disseisin.

(vi) The actions which arise out of the incapacity of persons.

Dum fuit non compos mentis.[4] This was a writ of entry (in the *per*, *cui*, or *post*) by which a person, or his heir, who had aliened his land in fee simple, fee tail, for life, or years, while he was of unsound mind, could recover the land.

Dum fuit infra ætatem.[5] This was a similar writ in the case of alienation during infancy.

Sine assensu capituli.[6] This writ lay in the *per*, *cui*, or *post* for the successor of a dean, bishop, prebendary, abbot, prior, or master of a hospital where the predecessor had alienated the lands belonging to the house or office without the consent of their convent or chapter.

(vii) The actions concerning ecclesiastical property.

These actions were a very important branch of the law of real actions, and we can see here, as in other cases, the same distinct varieties.

The writ of right of advowson.[7] This was a writ analogous to the writ of right for land by which a person seised in fee simple of an advowson could recover the advowson. It very early came to be superseded by the two following writs.

The assize of darrein presentment.[8] This assize was summoned to answer the question, who presented on the last

[1] For these writs see Booth, Real Actions 200; F.N.B. 221 D-O; App. Ia (9).

[2] Bracton f. 281a; Bracton's Note Book, case 1215.

[3] See Y.B. 6 Ed. II. (S.S.) 212 where the proprietary character of the writ comes out in the remark of Bereford, C.J., to the effect that "this is a writ of cosinage in which you can take your title as high as you want to as long as you can make yourself cousin to him from whom you take your title."

[4] Booth, Real Actions 189.

[5] Ibid 193.

[6] F.N.B. 194I-195B.

[7] Booth, Real Actions 121.

[8] Vol. i 276, 329; Booth, Real Actions 121, 224; P. and M. ii 136, 137; see Y.B. 3, 4 Ed. II. (S.S.) 47 for an instance.

vacancy of a church, the advowson of which A is claiming against B. "The act of successfully presenting a parson to a church was regarded as a seisin, a possession of the advowson,"[1] so that if A or his ancestors presented on the last occasion, A will probably[2] be adjudged to be entitled to present on this vacancy.

Quare impedit.[3] This writ was an extension of the assize of darrein presentment. If A presented to a church on the last vacancy, and, in the meantime, conveyed his right to B, B could not assert his right by the assize; but he could sue by this writ any one who hindered his right. Originally, if the wrongdoer presented before action brought, B had no remedy whatever; but the Statute of Westminster II. (1285) allowed him a period of six months from the vacancy within which to assert his right. The same statute also preserved the rights of infants, married women, and reversioners by allowing them to bring the assize or this writ, in spite of a usurpation made while they were under disability; and gave damages to the plaintiff. It was for this reason that, in Richard II.'s reign, it was regarded as being rather delictual than proprietary in its character.[4]

Supplementary to these writs was the *Quare non admisit.* It lay when a man, having recovered his advowson, and having got a writ to the bishop to admit his clerk, the bishop refused to admit him.[5]

The assize utrum was directed to a different purpose. Its original object was, as we have seen, to determine whether land was held by spiritual or by a lay tenure, in order that the case might go before the proper tribunal, spiritual or lay.[6] But in spite of the clause of the Constitutions of Clarendon,[7] which stated that all cases concerning land held in frankalmoin should go to the ecclesiastical courts, the king's courts had obtained jurisdiction over all land held by this tenure. The

[1] Maitland, Forms of Action 326; below 98, 100.

[2] A might have granted the advowson to B, and B could plead this by an exceptio, P. and M. ii 137.

[3] Ibid 137, 138; 13 Edward I. st. 1 c. 5; Booth, Real Actions 223 seqq.; App. Ia (11).

[4] Y.B. 12 Rich. II. 27 *per* Charlton, C.J.

[5] F.N.B. 47C; for a case in which such a writ was brought see the Eyre of Kent (S.S.) iii 162; for other supplementary writs relating to these matters see F.N.B. 36G-39G.

[6] Vol. i 276, 329-330; Glanvil, xiii 2, mentions other recognitions "utrum," e.g. "utrum aliquis seisitus fuerit de aliquo libero tenemento die quo obiit ut de fœdo vel ut de vadio; utrum aliquis sit infra ætatem vel plenum habuerit ætatem; utrum aliquis obierit seisitus de aliquo libero tenemento ut de fœdo vel ut de warda;" but these never developed into definite legal processes for beginning a litigation.

[7] c. ix; below 35.

ordinary tenant in frankalmoin, therefore, had the ordinary freeholder's remedies, possessory and proprietary; and he was denied any others. But the land belonging to a parish church was regarded as a gift to the church and not to the rector and his successors. The rector was regarded simply as the guardian of the church; and though he might have a possessory remedy, e.g. the assize of novel disseisin, he had no proprietary remedy. The assize utrum came in the thirteenth century to be so used that it gave him, in right of his church, a proprietary remedy. This writ, said Scrope *arguendo* in 1312-1313, "is a writ of right, in which the parson can try the right of his church as highly as by any other writ that there is;" and to this argument Bereford, C.J., assented.[1] Thus the writ came to be "the parson's writ of right."[2]

(viii) The actions which deal with abuse of the process of the court.

Some of the actions which were given to remedy these abuses had a peculiar reference to the real actions. The writ of *Attaint* lay originally only against the assize.[3] The writ *Quod ei deforceat*[4] was given by the Statute of Westminster II. (1285) to enable a tenant of the particular estate of freehold to recover land which he had lost by default in a real action. The writ of *Redisseisin* was given by the Statute of Merton (1235-1236), and lay when a man who had recovered in an assize and had had execution was again disseised by the same disseisor. The writ of *Post disseisin* was given by the same statute after a recovery in any real action. The disseisor was sent to prison, and the injured party was by the Statute of Westminster II. awarded double damages.[5] I have already mentioned the statutes which gave special remedies in the case of forcible entries.[6]

At the beginning of the mediæval period the sphere of the real actions was kept quite distinct from the sphere of the personal actions;[7] but, as we have seen, the action of trespass and its offshoots showed, at the end of this period, a tendency to encroach upon the sphere of the other personal actions.[8] It was hardly possible that its expansion should leave the real actions wholly unaffected. The old stringency was being somewhat relaxed. The forms of action were no longer divided from one

[1] Y.B. 6 Ed. II. (S.S.) 70, 71.
[2] P. and M. i 226-228; the parson is not yet regarded as a corporation sole, below 480-481.
[3] Vol. i 337.
[4] Booth, Real Actions 253; 13 Edward I. st. 1 c. 4.
[5] Booth, Real Actions 260, 261; 20 Henry III. c. 3.
[6] Vol. ii 453; below 27 n. 5.
[7] Vol. ii 261; below 27 n. 4.
[8] Vol. ii 455-456.

another by compartments which were completely watertight.[1] From an early date trespass was regarded as being in some cases supplementary to the assize of novel disseisin. In the assize the plaintiff could only recover damage to the actual freehold, and not damages for injury to the chattels thereon,[2] unless the injury to the chattels and the disseisin were all part of one transaction.[3] In other cases it was possible to make trespass do the work of the novel disseisin;[4] and Henry VI.'s statutes of forcible entries, by giving actions of trespass, encroached on the sphere of the assize of novel disseisin.[5] But it is not to be expected that trespass will make serious advances in this direction, in spite of the greater convenience of its procedure, till something more than damages can be recovered by its means. It was used at the end of this period to protect the copyholder[6] and the lessee for years;[7] and, when it has become possible by its means to restore to the lessee his term, it will become by easy fictions a serious rival not only to the novel disseisin, but also to many other real actions.[8] But this is as yet in the future.

There are, however, other cases in which some forms of the action of trespass were making inroads upon the outlying frontiers of the field of the real actions. I have already noted that what was in substance a variety of the writ of trespass could be used to do the work of the writ of right of ward.[9] In Edward III.'s reign another variety of the same writ became concurrent with the action of replevin.[10] But trespass was chiefly used, or attempts were made to use it, in the cases where the specific restitution given by the real actions was not so clearly superior to the damages given by the personal action. It is clear that encroachments upon the free enjoyment of some of that miscellaneous collection of incorporeal things known to the mediæval common

[1] Vol. ii 454-455.

[2] Eyre of Kent (S.S.) iii 63, 73-74.

[3] This is Mr. Bolland's explanation of the cases cited, ibid xx.

[4] Bracton's Note Book case 378; Y.B. 11, 12 Ed. III. (R.S.) 186 *Stonore*, C.J., says, "In a plea of trespass, by plea of the *defendant* the plea may be turned out of the nature of the writ, by pleading in the Right; but let the *plaintiff* take care for himself that he do not plead out of the nature of the writ;" ibid 516 *Trewith* says, "It is not decided whether a writ of trespass lies for a disseisin;" see Y.BB. 14 Ed. III. (R.S.) 230, 232; 14, 15 Ed. III. 104 seqq. for cases in which trespass was brought where an assize might have lain.

[5] 8 Henry VI. c. 9; Hale, H.C.L. 210, 211, "Many titles of land were determined in personal actions; and the reasons hereof seem to be . . . 3rdly, because the statute of 8 Henry VI. had helped men to an action to recover their possessions by a writ of forcible entry; even while the method of recovery of possessions by ejectments was not known or used."

[6] Below 208-209; vol. ii 578.

[7] Below 216; vol. ii 581.

[8] Bk. iv Pt. II. c. 1 § 1.

[9] Above 17 n. 1; and the writ of Deceit and a Cui in vita might be concurrent, Y.B. 20 Ed. III. (R.S.) i 428.

[10] Below 285.

law might easily be remedied by some form of this action.[1] In Henry IV.'s reign an attempt was made to bring this action for an obstruction to a right of way; but it was laid down that the case was one for the assize of nuisance, and the writ abated.[2] But though, both in this period[3] and later,[4] there was some reluctance to interfere with the sphere of the real actions, the opinion was expressed that as against persons against whom the assize did not lie, or for minor disturbances, not amounting to total obstruction, the action might lie.[5] As early as Richard II.'s reign it was allowed to do the work of the writ Curia Claudenda;[6] and in Henry VI.'s reign there are several cases in which trespass on the case was used either as a substitute for or a supplement to a Cessavit,[7] or a Secta ad Molendinum.[8] It was in respect to such rights as annuities and corodies,[9] which lie on the borderland between property and contract, that the most definite encroachments were made in this period. In Richard II.'s reign it was allowed that the infringement of a customary right of the bedell of a hundred to claim, as incident to his office, certain gallons of beer, could be remedied by action of trespass on the case;[10] and, in Edward IV.'s reign, "Moyle and other justices and some of the serjeants resolved that, if a man grants me that I shall have yearly for my life hay and straw in my house sufficient for the keep of two cows during the winter season, and if I am seised of this right and disseised, I shall have action on my case."[11] These precedents were cited by Coke in the *Earl of Shrewsbury's Case*,[12] in which the modern rule was established that, in such cases, the parties might sue either by an assize or by action of trespass on the case.

[1] Vol. ii 355-356.

[2] Fitz., Ab. *Accion sur le Cas* pl. 24, *Markham* said, "Si home leve un fosse ou molin a travers de mon chymin, j'avera assise de nusans et nul auter brief;" cp. Y.B. 19 Hy. VI. Mich. pl. 49 *per* Paston, J. (p. 29).

[3] Y.B. 20 Hy. VII. Mich. pl. 18, "A ce que Kingsmill dit que ou Nusance gist, la ne gist Action sur le cas jeo agre bien: car l'un est real, et l'autre mere personel, et tiels actions ne peuvent estre ensemble;" this idea survived till the abolition of the real actions in the rule that the action of debt would not lie to recover a freehold rent, so long as the freehold on which it was charged existed, Thomas v. Sylvester (1873) L.R. 8 Q.B. at p. 371 *per* Blackburn, J.

[4] See Anon. (1566) Dyer 248b; Moore v. Browne (1573) ibid 319b.

[5] Y.BB. 19 Hy. VI. Mich. pl. 49; 33 Hy. VI. Trin. pl. 10 *per* Prisot, C.J., and Moile, J.

[6] Fitz., Ab. *Accion sur le Cas* pl. 50.

[7] Y.B. 22 Hy. VI. Hil. pl. 36 (p. 47).

[8] Ibid Mich. pl. 33.

[9] Below 152-153.

[10] Fitz., Ab. *Accion sur le Cas* pl. 51—this indulgence was put on the ground that the man could hardly be said to have a freehold; as *Thirning* said, "Paraventour il n'ad riens mes pur cause de son office pour le temps, et, come un clerke cieins, il n'ad rien forsque un occupacion pour le temps; uncore, si ascun luy fait tort a chose que affectira a son office, il avera brief de trespass."

[11] Ibid pl. 17 = Y.B. 4 Ed. IV. Pasch. pl. 2.

[12] (1611) 9 Co. Rep. at f. 51a.

In these directions, therefore, certain small inroads had been made upon the sphere of the real actions by the action of trespass on the case. When a variety of trespass on the case came to be regarded as a contractual action,[1] we can see one road by which some of these miscellaneous incorporeal things of mediæval law lost their character of things and became rights arising out of contract. We can see, too, one of the roots of the later doctrines as to covenants running with the land. The rights conferred by these covenants were in many cases things which issued out of the land, the right to which could be enforced against the holder of the land for the time being by real action.[2] Some of them did not lose this characteristic when they came to be regarded as rights which rested upon the agreement of the parties. But, as I have said, the supremacy of this organized system of real actions was not seriously threatened during this period. That supremacy it had held for three hundred years, so that it was inevitable that the rights which were protected by it should assume a form different from those which were not so protected. In fact, the determination of the question whether any given right fell within its sphere has in many cases affected the whole subsequent history of that right by placing it in one or other of the two great categories known to English law, real or personal property. We do not meet the term "real property" in the mediæval common law; but the foundations of that conception were laid in the rules which determined the sphere of these real actions. So marked were the peculiarities impressed upon the rights which fell within that sphere that, though the real actions have disappeared, real property remains. In the ensuing sections we shall see what rights in the land were included within the sphere of influence of the real actions and what were not; and we shall see that their inclusion or exclusion has given rise to large differences in the substantive law relating to them.

§ 2. Free Tenure, Unfree Tenure, and Chattels Real

The distinctions between free tenure, unfree tenure, and chattels real are fundamental in the land law. I have already said something of these distinctions.[3] Here I must say something a little more in detail about their origins and the principles which underlie them.

Free Tenure and Unfree Tenure

In the thirteenth century the legal effect of deciding that land was held by free or unfree tenure was clear. If the land was

[1] Below 429-453.
[2] Cp. Holmes, Common Law 388-390; below 161-165.
[3] Vol. ii 260-262, 576-578, 581-582.

held by free tenure the tenant was protected by the courts of common law and by the real actions. If it was held by unfree tenure the tenant was protected neither by these courts nor by these actions. What was the principle which underlay this procedural test, and what were its effects upon the law?

The free tenures cover a wide field, comprising many kinds of relationship between many different classes of persons;[1] and the conception of tenure covers a yet wider field.[2] But all those who held by these free tenures were protected by the same courts and by the same forms of action. It was only those who held by unfree tenure who escaped their direct[3] influence. Now, this extension of the jurisdiction of the royal courts effected a great simplification in the land law. To see how great it was we need only look across the Channel. In France the laws relating to the military fiefs, to the lands of the *roturier* (a person answering in some respects to the socage tenant), and to the lands of the villein, all differed from one another;[4] jurisdiction over land held by these different kinds of tenure was parcelled up among many feudal lords;[5] and, as we have seen, the *franc alleu* was still known.[6] It is clear, therefore, that the royal judges, in making this great simplification in the land law, must have been obliged to ignore many old distinctions, and to draw their lines through many different classes of tenure and classes of persons which, in the old days of customary law, shaded off into one another.[7] Certain cases decided in the thirteenth century, when these great distinctions were being drawn, afford an illustration. These cases apparently lay down the rule that the lord cannot eject a free man holding by unfree tenure so long as he duly performs his services.[8] But in later law, so soon as it was admitted that the services were villein services, the courts of common law would have enquired no further. These cases are in fact a survival from the days before all land-holding had been neatly divided into two classes upon the principle of protected or not protected by the king's court.[9] They cannot be regarded as foreshadowing the copyhold tenure of later law.[10] It is true that some of the customs observed by the unfree tenants within the manor, and

[1] Vol. ii 200, 260; below 34-54. [2] Ibid 199-201.
[3] As to their indirect influence see vol. ii 380-381.
[4] Esmein, Histoire du Droit Français (11th ed.) 215-248.
[5] Ibid 294-301. [6] Vol. ii 75 n. 8.
[7] P. and M. i 389.
[8] Bracton's Note Book cases 70 and 88 (1220); case 1103 (1225); a decision of William Raleigh cited Bracton f. 200; for these cases see Vinogradoff, Villeinage 78-81; the Mirror tries to distinguish the villein from the serf (cp. Vinogradoff, op. cit. App. III.), and the book sometimes represents conservative opinion, vol. ii 332-333.
[9] P. and M. i 340 n. 3.
[10] For this view see Leadam, L.Q.R. ix 351.

that some of the exceptional modes of land-holding recognized by the common law, supply striking evidence of old resemblances ignored by the clear-cut distinctions of the royal judges;[1] but copyhold tenure was the product of later influences, such as the growth of fixed customs created by the working of the manorial courts, and changes in the economic system.[2]

What then were the tests adopted by these judges if it became necessary to decide whether a given piece of land was held by one tenure or another, and what were the social or economic facts at the back of this distinction?

The tests which the judges applied were somewhat fluctuating and uncertain. They sometimes took some particular incident and treated it as presumptive evidence of unfree tenure. The incident most usually taken is Merchet—the fine paid for leave to give a son or daughter in marriage.[3] Other incidents were the liability to tallage,[4] and the fact that the land descends to the youngest child.[5] But none of these tests based upon the incidents of tenure were decisive, because such incidents were found in the case of lands held by free tenure as well as in the case of lands held by unfree tenure.[6] A more satisfactory test was found in the character of the services themselves. In employing this test the judges sometimes dwelt upon the certainty or the uncertainty of the services,[7] sometimes upon the nature of the services.

When the judges talked of services which were uncertain they did not mean that the tenant's work was not fixed. As a rule it was very elaborately fixed in the manorial extent. They meant that the lord could order the tenant to do one of several things.[8] The distinction which they had in their minds really corresponds to the distinction drawn in later law between the servant and the independent contractor.[9] The one has the ordering and control of the work which he is doing, the other has not. So with these different classes of tenant—the free tenant may have to perform various agricultural services not very different in kind from some of those required of the unfree tenant;[10] but as

[1] Below 256-275; and see vol. ii 72-73, 376. [2] Below 202-213.

[3] Vinogradoff, Villeinage 153; Bracton f. 208b, "Talliari autem potest ad voluntatem domini ad plus vel ad minus. Item dare merchetum ad filiam maritandam, et ita semper tenebitur ad incerta, ita tamen quod si liber homo sit, hoc faciat nomine villenagii et non nomine personæ, nec etiam tenebitur ad merchetum de jure, quia hoc non pertinet ad personam liberi, sed villani."

[4] Vinogradoff, Villeinage 83, 163; P. and M. i 354-356.

[5] Vinogradoff, Villeinage 157. [6] Ibid 155; P. and M. i 355.

[7] Bracton f. 208b, "Ille qui tenet in villenagio, sive liber sive servus, faciet de villenagio quicquid ei præceptum fuerit, nec scire debeat sero quid facere debeat in crastino, et semper tenebitur ad incerta;" cp. Ramsey Cart iii no. 680, and ibid pp. 283, 289, 295 for some cases of services of a mixed character.

[8] P. and M. i 353, 354; for a specimen of a Manorial Extent see App. II.

[9] Pollock, Torts (5th ed.) 75.

[10] See Eynsham Cart. i nos. 409, 467; Ramsey Cart. i no. 226.

a rule the free tenant is, subject to the necessity of performing certain definite duties, more completely the master of his time and labour. Moreover, we must not forget that, though the royal courts drew a clear distinction between holding by an unfree tenure and being personally unfree,[1] in a large number of cases unfreedom of tenure and personal unfreedom went together. The villein is not master of his own time or his own person. Tenure of land in return for services which put a large part of a man's time and the ordering of his life at the disposal of another may well have seemed to connote unfree tenure. The man himself, if personally free, could throw up his holding and depart; but while he remained he lived the life of a villein.[2]

The same principle is at the back of the distinction based upon the nature of the services due. A tenant whose chief services were labour services held by an unfree tenure; a tenant who paid rent—though he performed some labour services—held by a free tenure.[3] In the former case the tenant was but a unit in the agricultural organization of the manor. He was simply one of the hands by means of which the lord's demesne was cultivated. In the latter case the tenant was in the position of a man who is engaged on a venture of his own. It is true indeed that even from the free tenant the system of agriculture in vogue demanded much communal action.[4] It is true that the jurisdictional and police powers sometimes annexed to the manor increased a communal feeling which came very naturally to a feudal age.[5] But if we look simply at the facts of land tenure we can see, as Sir Paul Vinogradoff has said, that "the tenants in villeinage generally appear arranged into large groups, in which every man holds, works, and pays exactly as his fellows; so that when the tenements and services of some one tenant have been described we then read that the other tenants hold similar tenements and owe similar services. On the other hand, the freeholds seem scattered at random without any definite plan of arrangement, parcelled up into unequal portions, and subjected to entirely different duties. One man holds ten acres and pays 3s. for them; another has eight and a half acres and gives a pound of pepper to his lord; a third is possessed of twenty-three acres, pays 4s. 6d., and sends his dependants to three boon-works; a fourth brings one penny and some poultry in return for his one

[1] Vol. ii 264-265, 577.

[2] Bracton f. 208b, "Si autem villanus fuerit, omnia faciat et incerta tam ratione villenagii quam personæ, nec liber homo, si sic tenuerit, contra voluntatem domini villenagium retinere poterit, nec ipse compelli quod retineat nisi velit."

[3] P. and M. i 354; in the eleventh century we get a similar distinction between socmen and villeins, Vinogradoff, English Society 439.

[4] Vol. ii 56-61, 376-377.

[5] Vol. i 184-186; vol. ii 381-384.

acre. The regularity of the villein system seems entirely opposed to the capricious and disorderly phenomena of free tenure."[1] The royal courts had confined the political influence of feudal jurisdiction within the narrow bounds of the manor.[2] When they had assumed jurisdiction over all lands held by free tenure they may well have thought that enough had been done. It may well have seemed that to extend this jurisdiction further would, by depriving landowners of proper control over the working of their estates, have created great difficulty in their management; and the disputes between tenants and their lords on the manors of the ancient demesne prove that such a view would not have been groundless.[3] Even in the nineteenth century the legislature thought that it was "much too delicate a matter" to interfere as between the stewards of manors and their lords.[4] For these reasons we can see that at the back of the vague and sometimes contradictory criteria applied by the royal courts to distinguish free from unfree tenure there was, in the thirteenth century, a broad basis of social and economic fact.

This fundamental division in the economic ordering of society in the thirteenth century was given a prominence and a permanence by the procedural rule which the royal courts based upon it. Consequently its effects on the land law lasted long after the facts upon which it was originally based had changed. Labour services were commuted for money payments. Tenants who held by an unfree tenure got the protection of the royal courts. A definite body of law relating to land held by unfree tenure—not wholly unaffected by the common law relating to lands held by free tenure—gradually emerged. Tenure in villeinage was replaced by copyhold tenure;[5] and with the disappearance of the older tests, the conveyancing test of our modern law makes its appearance. But, owing to this procedural rule made in the thirteenth century, lands held by unfree tenure had remained outside the sphere of the real actions, and only came under the

[1] Villeinage 334, 335; Bracton's Note Book case 1210 gives a very good illustration of the various tests employed to distinguish free from unfree tenure. In that case the jurors found that Roger paid 2s. a year, did two works in the autumn, the lord finding food, and gave two fowls at Christmas, "et manducabit cum domino suo;" and that neither he nor his ancestors had paid merchet nor tallage. Thomas (the lord) admitted that other tenants did all manner of villein services. Therefore "Quia nullum servicium facit nisi predictos denarios et servicia nominata nec dat merchetum pro filia nec talliatus est, ideo consideratum est quod tenuit libere."

[2] Vol. i 179-180. [3] Vol. ii 378; below 204.

[4] Watkins, Copyholds (4th ed. 1828) ii 454, tells us that, "Some few years ago there was a design of bringing a Bill into Parliament for regulating the fees of Stewards of Manors, but the Legislature thought it much too delicate a matter to interfere in, and the design was dropped" (cited Webb, Local Government, Manor and Borough 71 n. 1).

[5] Below 206.

direct influence of the royal courts two centuries later than lands held by free tenure. The resulting differences in substantive law have made the distinction between free and copyhold tenure fundamental in our modern land law.

Free Tenure and Chattels Real

The real actions were denied alike to the unfree tenant and to the man who held for a term of years; and therefore the interest of the lessee for years, like the interest of the unfree tenant, falls apart from the law relating to the free tenures. But the ground upon which these remedies were denied to the lessee for years was very different from the ground upon which they were denied to the unfree tenant. The denial of these remedies to the lessee for years was not, in the first instance, founded upon any great social or economic division. It was founded, as we have seen, upon an arbitrary and unfortunate application of Roman doctrines of possession.[1] We shall see that the subsequent history of the lessee for years is very different from that of the unfree tenant. The interest of the latter is gradually absorbed into the law of real property under the name of copyhold tenure. The interest of the former becomes a chattel real and remains personal property.

§ 3. The Free Tenures and their Incidents

The Free Tenures

(i) Frankalmoin.

"Tenant in frankalmoin is, where an abbot or prior, or another man of religion, or of holy church, holdeth of his lord in frankalmoin, that is to say in Latin, *in liberam elemosinam*, that is, in free alms."[2] The word *elemosina* means simply charity; and in Domesday Book land given for a charitable motive, e.g. to a blind man, is said to be given in elemosina.[3] But, as we have seen, by far the most frequent donees of land given out of charitable motives were churches and monasteries.[4] A gift, therefore, in elemosina comes to mean a gift to a religious person or body.[5] But the land, though given directly to the religious person or

[1] Vol. ii 205.

[2] Litt. § 133; cp. Y.B. 30, 31 Ed. I. (R.S.) 484 for a curious case of a gift to an individual for life, remainder to the church. The land was not held in frankalmoin till the life dropped.

[3] P. and M. i 219, 220, citing D.B. i 293, and iv 466.

[4] Vol. ii 68-69.

[5] P. and M. i 220, 221, "In the twelfth century, the century of new monastic orders, of lavish endowments, of ecclesiastical law, the gift in free, pure, and perpetual alms has a well-known meaning."

body, was regarded as given, through it, to God and the saints.[1] The donor no doubt expected spiritual benefits from the prayers of the donees; but as the land was primarily regarded as given through them to God, no very definite enumeration of the services expected could be made, and no oath of fealty could be required. It did not, however, always follow that the land in the hands of the donees owed no services of a secular, tangible sort. Land so given might be, and in many cases was, given by a mesne lord.[2] That lord might owe military service, or rent, or labour services for the land. The mere gift could not free the land from liability to perform these services. To effect this there would be need of the consent of the donor's lord. Therefore for land held in frankalmoin secular services were often due, and might be performed either by the donor or by his donee in frankalmoin according to the bargain made between them at the time of the gift.[3] Moreover, it was not impossible that even as between donor and donee some secular service might be reserved if the gift was only in "free and perpetual alms," and not in "free, pure, and perpetual alms."[4]

In the twelfth and thirteenth centuries the characteristic which distinguished tenure in frankalmoin from other tenures was, not so much the absence of secular service, as the fact that jurisdiction over land so held belonged to the ecclesiastical courts. But we have seen that by the end of the thirteenth century this test was no longer applicable.[5] The jurisdiction of the ecclesiastical courts over land was limited to consecrated land or buildings.[6] The king's courts had assumed a jurisdiction over land held in frankalmoin as exclusive as that assumed by them over land held by any other free tenure. What then was the distinguishing feature of this tenure? It was the tenure by which religious persons or bodies held land; but the fact that land was so held afforded no proof of its existence, because such persons or bodies held land by many different tenures. A better test was found in

[1] Bracton f. 12, "Primo et principaliter fit donatio Deo et ecclesiæ . . . secundario canonicis vel monachis vel personis;" the saint is a landowner and in that capacity may be guilty of trespass—so it is written in Domesday Book concerning Sanctus Paulus, D.B. ii 13, cited Ballard, Domesday Inquest 92.

[2] P. and M. i 223, 224.

[3] Ibid i 224 n. 1; cp. Y.B. 12 Rich. II. 178—a prior holding of W. in frankalmoin compels W. by writ of mesne to acquit him of the services which W. owes to his lord the Earl of Salisbury.

[4] Bracton's Note Book case 21, land was demised to a parson, reserving twelve pence of rent, three ploughings and ditchings, and twenty-one shillings' worth of scutage; the court of Common Pleas says, "plures terræ datæ sint in elemosinam ecclesiis quarum quædam datæ sunt in liberam puram et perpetuam elemosinam, illa scilicet que nullum faciunt servicium, alia in liberam elemosinam tantum, scilicet illa que faciunt servicium quod ad terram illam pertinet;" Eynsham Cart. i no. 25 (1213-1225) reservation of half a pound of cumin, "salvo servitio domini regis."

[5] Vol. ii 305.

[6] Vol. i 630.

the fact that it was land held with no obligation of fealty, in return for services of a general character due to God—services which, not being capable of enforcement by ordinary processes of law, were only capable of enforcement by spiritual censures; and this absence of secular service is the test adopted by the law and stated by Littleton.[1] But there was one difficulty about adopting this test. What was to be the position of lands in which some definite service was reserved? If the definite service was of a secular kind, like that mentioned in the case cited from Bracton's Note Book,[2] the tenure would no doubt be classed as one of the other free tenures—probably socage. If it was of a spiritual kind it was called tenure by *Divine Service*.[3] In this case fealty was due to the lord, and he could distrain if the services were not done, "because the divine service is put in certain by their tenure which the abbot or prior ought to do."[4]

The effect of Edward I.'s legislation was to make tenure in frankalmoin a tenure of diminishing importance. (1) The Statutes of Mortmain[5] prevented indiscriminate grants of land to the religious. (2) If a religious house alienated land to a secular person the land ceased to be held by this tenure, because no secular person could hold by it.[6] On the other hand, the Statute of Quia Emptores[7] prevented any person from granting lands in fee simple so that the lands were held of him. If therefore a tenant by knight service got a licence in mortmain and made a grant to a religious house, that house held, not of the grantor in frankalmoin, but of the grantor's lord by the same knight service as that upon which the grantor had formerly held.[8] (3) In the instance just given the grantee could not hold of the grantor's lord in frankalmoin, even if the lord were willing that he should so hold; for it was laid down that lands could only be held in frankalmoin of the grantor or his heirs.[9] Thus, if an abbot held by this tenure of a mesne lord, and the mesne lord died without heirs, the abbot could not hold by this tenure of the lord paramount. He held of such lord by fealty.[10] As Littleton says,[11]

[1] Litt. §§ 135, 136; Y.B. 33-35 Ed. I. (R.S.) 206 *per* Bereford; "libere et quiete sicut elemosinam decet," Eynsham Cart. i nos. 85a, 87, 209.

[2] Above 35 n. 4.

[3] Litt. § 137, "Such tenure shall not be said to be tenure in frankalmoin, but is called tenure by divine service. For in tenure in frankalmoin no mention is made of any manner of service; for none can hold in frankalmoin, if there be expressed any manner of certain service that he ought to do, etc.;" cp. Y.B. 13, 14 Ed. III. (R.S.) 282, 284.

[4] Litt. § 137.

[5] Vol. ii 348-349; below 86-87.

[6] Litt. § 139.

[7] Vol. ii 348; below 80-81.

[8] Litt. § 140; Y.B. 12 Ed. IV. Pasch. pl. 7 (p. 4).

[9] Y.B. 3 Ed. II. (S.S.) 169, 170, "Frankalmoin is of such a nature that the tenant can never attorn away from the feoffor nor from his heirs;" Y.B. 13, 14 Ed. III. (R.S.) 266, 268.

[10] Litt. § 141 and Y.B. 13, 14 Ed. III. (R.S.) 282.

[11] § 140.

except in the case of a grant by the king, "none can hold in frankalmoin, unless it be by title of prescription, or by force of a grant made to any of his predecessors before the same statute (Quia Emptores) was made." This stamps it as a stationary and a gradually decaying tenure.

(ii) Knight Service.

It is possible that a person who had not read anything about tenure by knight service except the account given by Littleton would wonder how the tenure got its name. He would read much of such incidents of the tenure as wardship and marriage[1] —but nothing of military service. He would learn indeed that such tenants paid "escuage" if they did not perform in person the duty of castle guard;[2] but he might wonder why this payment of escuage was treated differently from the payment of rent which was due from the socage tenant. It is true that if he turned to Littleton's chapter on Escuage he would learn that it was a money payment connected with the Latin *Scutagium*, and that it was "commonly said" to represent the personal military service originally due from the tenant to the crown. But he would also learn that the amount which could be levied as escuage was dependent upon parliamentary assessment; and, seeing that the military service was due to the king, he might wonder why escuage was apparently a payment made by the tenant to his mesne lord.[3]

The difficulties which arise in understanding Littleton's account of tenure by knight service show that by the fifteenth century it had lost its original meaning. In fact, it had become merely a part of the law of property. But it had once been far more than this. Tenure by knight service was the typical tenure of the feudal system, and, as we have seen, the feudal system was far more than a system of land tenure.[4] In the twelfth century a tenant holding by this tenure often filled a public position of no mean importance. His military service (in theory) protected the state.[5] He was entitled to a voice in the commune concilium.[6] He had or claimed to have jurisdiction over his tenants.[7] But the development of the art of war, the growth of a centralized

[1] Litt. §§ 103-111, 114, 116. [2] § 111.

[3] § 95, "Escuage is called in Latin *scutagium*, that is service of the shield; and that tenant which holdeth his land by escuage holdeth by knight service;" § 97, "It is commonly said that the escuage shall be assessed and put in certain; *scil.* a certain sum of money, how much every one which holdeth by a whole knight's fee, who was neither by himself nor with any other with the king, shall pay to his lord of whom he holds the land by escuage;" see also §§ 100, 101.

[4] Vol. i 17, 18.

[5] See Vinogradoff, English Society 190, 191 for the old idea that land held by such persons in demesne was not liable to geld.

[6] Magna Carta (1215) c. 14. [7] Vol. i 25-26, 176-178.

government, and the successful competition of the royal courts had gradually diminished the importance of this tenure in public law. The inefficiency of the feudal levy for any prolonged campaign had soon become apparent, and tenure by barony ceased to be a title to a seat in the House of Lords.[1] The tenant by knight service found his remnant of jurisdiction of little avail, and was often glad to avail himself of the superior processes of the courts of common law. The same causes which destroyed the political influence of feudalism necessarily destroyed the old meaning of tenure by knight service. The old state of society in which it had once flourished had disappeared, leaving, as we have seen, a few archaic survivals in our public law,[2] and in our private law leaving this tenure in the position described by Littleton. It had been reduced to this position by complicated and still obscure processes, the outlines of which I must now endeavour to trace.

It is fairly clear that William I. enfeoffed his followers with tracts of English land, and placed them under the obligation of performing in return a certain amount of military service. This military service was the service due (*servitium debitum*) for the land so granted.[3] The arrangement thus made was the origin of tenure by knight service in the form in which that tenure was known to the common law. Existing records show that the large landowners, both lay and ecclesiastical, owed for their lands a definite quota of knights. The time for which the knights were required to serve seems to have been early fixed at the period of forty days.[4] But as to the exact number of the knights which each must produce there was often some uncertainty. "The amount," says Mr. Round, "of the *servitium debitum* was a matter of custom and tradition, and could not usually be determined by reference to written grants or charters."[5] In a great many of these cases the tenant had been enfeoffed since the Conquest, perhaps without charter.[6] But as a rule the number of knights due is found to be some multiple of five or ten. The

[1] Vol. i 357 and n. 11.

[2] See vol. i 179-187 for the manorial jurisdiction of later law.

[3] Vol. ii 169.

[4] For a possible explanation of the "forty days" see below 40; as Maitland says, it existed "rather in theory than practice, and its theoretic existence can hardly be proved for England out of any authoritative document;" but it was known in Normandy both before and after the Conquest, Haskins, Norman Institutions 20, 21.

[5] Feudal England 257, citing some returns made to the inquest of 1166, e.g. William fitz Alan's tenants assert "that his Norfolk fief non debet domino Regi nisi i militem . . . ut antiqui testantur; that his Shropshire fief non debet Regi nisi x milites in exercitu . . . sicut antiqui testantur; and that, as to his Wiltshire fief, non sumus certi quod servitium debeat Regi de hoc tenemento."

[6] Provisions of Westminster 1259 § 1 (Stubbs, Sel. Ch. 401); Round, loc cit. 258; Vinogradoff, English Society 227.

reason for this is, Mr. Round thinks, that the unit of the feudal army in England was a *constabularia* of ten knights. This unit appears in the reigns of Stephen and Henry II., and was familiar to the Normans in Normandy.[1]

Thus by the deliberate acts of the first Norman kings the vague conditions of land-holding prevailing in the country were given a new and a definite form. Tenants in chief now held of the crown by a definite military service, and all the incidents of that tenure familiar to the Normans were introduced, as Henry I.'s charter shows. At the same time it is probable that, just as feudal jurisdiction was nothing very new to the older inhabitants, so land-holding on such conditions did not appear to them to be a very strange thing. They were, as we have seen, accustomed to connect with land ownership both military service and the right to exercise private jurisdiction. What was new was the substitution of one definite principle for the older confusion caused by lack of such one definite principle.[2]

The king's relation was solely with his tenants in chief. It was no concern of his what they did with their land so long as they produced their knights when liable to do so. It was, of course, the policy of the Norman kings to emphasize the fact that they were not only the lords of tenants, but also the kings of subjects.[3] Thus they insisted, and insisted successfully, that military service was due to no one but the king, though no such rule as this was known in Normandy.[4] But, as we might expect, it is their capacity of lords of tenants that appears to predominate in their relations to their tenants by knight service. This is very clearly put by Mr. Round. "Making every allowance," he says, "for the policy of the Conqueror in insisting on the direct allegiance of the under-tenant to the crown . . . the fact remains that what we may term the 'military service' bargain was a bargain between the crown and the tenant in chief, not between the crown and his under-tenants."[5] The tenant in chief was responsible to the king for his service, which he could perform either by

[1] Feudal England 259, 260.

[2] Vol. ii 74, 169-170; vol. i 24-25.

[3] P. and M. i 249.

[4] Ibid 243; hence military service was *par excellence* "forinsec" (vol. ii 200)—it was always due to the crown.

[5] Feudal England 248; cp. Ramsey Cart. ii nos. 474, 476 for the arrangements made by the abbot for the performance of his military service in 1244 and 1243; for the number of knights enfeoffed by him in 1184-1189 see ibid iii nos. 548, 581; it appears (no. 548) that with the knights there were enfeoffed, "Multi frankelanni, quorum quidam tenent dimidiam hidam, quidam plus, quidam minus, et debent et solent adjuvare milites ad servitium faciendum;" the knights themselves served in turn, cp. ibid ii nos. 474, 476, and ibid iii no. 550, "secundem consuetudinem abbatiæ;" for a statement of this custom see ibid iii no. 556; for the procedure to elect the knights to serve see Select Pleas in Manorial Courts (S.S.) 61, 63, 64, 77, 78, 80, 84.

enfeoffing mesne tenants, or by hiring knights, or in any other way he chose.

Probably in the first years after the Conquest this military tenure was really military. The Normans were a small army of soldiers in a hostile land, and it was to the tenants in chief and to their Norman mesne tenants that the king looked to put down English insurrections. But even when tenure by knight service really was a military tenure it is probable that the tenant could perform his service either by paying a substitute or by making a money payment to the person to whom the service was due. This payment is known as *scutage*[1] in later law. Mr. Round tells us that "payment in lieu of military service, which was the essential principle of scutage, was (in Henry II.'s reign) no new thing. The two forms which this payment might assume—payment to a substitute or payment to the crown—both appear in Domesday as applicable to the fryd. . . . From the very commencement of knight service the principle must have prevailed, for the 'baron' who had not enfeoffed knights enough to discharge his *servitium debitum* must always have hired substitutes to the amount of the balance. . . . It should be noted as a suggestive fact that the forty days of military service, though bearing no direct proportion either to the week or to the month, do so to the marc and to the pound. The former represents 4d. and the latter 6d. for each day of the military service."[2] If there is any connection between the "forty days" and the marc or pound it would seem that from a very early date military service was regarded as capable of expression in terms of money.

If it were necessary to consider only the relations between the king and his tenants in chief the commutation of military service for money would present fewer difficulties. But we must consider also the relation of the tenant in chief to his mesne tenants. The tenant in chief owed his service to the crown; the mesne tenants owed their services to their lord. The former must produce his quota of knights or pay the king; the latter must serve or pay their lord. It is possible that if a tenant in chief enfeoffed more knights than the quota he owed to the king, he could pocket the amount they paid him in commutation of the military service which they owed to him and he did not owe to the crown.[3] It is certainly clear that we must distinguish the

[1] Scutage is sometimes used to cover other payments, e.g. the aids (below 66-67) to which the lord was entitled.

[2] Feudal England 270; see Vinogradoff, English Society 15, 16 for the current rates of pay at different dates.

[3] Red Book of the Exchequer (R.S.) ii clviii, "In extreme cases, indeed, as in that of the military service prevalent in Normandy, the tenant in chief would be entitled to receive a contribution from his own men of much greater value than that which he tendered to the crown;" P. and M. i 244.

service due by the tenant in chief to the crown, or the money paid in commutation of this service, from the money paid by the mesne tenant to his lord in commutation of similar service. The first is a fine of an indeterminate amount,[1] to which tenants in chief of the crown *ut de corona*[2] were liable. The second is the fixed sum due from mesne tenants to their lord; and it is this sum which comes to be known as scutage. Madox[3] saw this distinction. It is perhaps most clearly brought out by Mr. Hall in his introduction to the Red Book of the Exchequer.[4] "The real meaning of scutage," he says, "is derived from the appearance of the tenant in the king's army, as certified by the Scutage Rolls of the Marshal, in order to qualify himself by force of the king's writ 'to have his scutage'[5] on his return, by way of an authorized levy upon his own sub-tenants. In this aspect the great bulk of scutage was actually collected by the tenant and not by the crown, and there is really no evidence that the current scale of one marc or two marcs [on the knight's fee] . . . was assessed for the purpose of receiving the commuted service of the lord, rather than to enable the latter to ascertain the amount that he would be authorized in levying from his sub-tenants. . . . The constitutional doctrine prevailed, unshaken by any lax exceptions, that the tenant in chief must perform his due service, the value of which far exceeded in all times the average value of scutage. Indeed, when personal service really fell into disuse in the thirteenth century, the value of the equivalent is seen in the immense fines paid by the military tenants 'ne transfretent.' . . . The proper view to take of the whole question would seem to be this: (1) That the tenants in chief rendered personal service, or a more or less real equivalent in the shape of payment of a deputy, *promissum*, *donum*, fine, or simply 'scutage,' but not necessarily the latter alone as a sufficient commutation in all cases. (2) That the tenant in chief who had thus satisfied the requirements of the crown might or might not obtain in turn facilities for recouping himself by the levy of scutage from his sub-tenants at a proportionate rate."

Of the manner in which many pressing questions of practical politics were intimately bound up with the various problems and the rival interests involved in tenure by knight service we may

[1] P. and M. i 247; see Ramsey Cart. iii no. 510 for a list of these sums paid by the abbot in 1313 and 1314.

[2] A tenant "ut de corona" held by direct grant from the crown: a tenant "ut de honore" held of the crown, but only because the lands of his mesne lord had come to the crown by escheat; generally speaking such a tenant, though holding in capite, was in the same position as a mesne tenant, Magna Carta (1215) c. 43; Challis, Real Property 4 n.

[3] Exchequer i 652, 657.

[4] ii clviii, clix; see E.H.R. xxxvii 321-324.

[5] See App. Ia (5) for the writ.

read at large in our constitutional histories. We are here interested in the effects which the policy pursued by the king and by the greater tenants in chief produced upon this tenure. It is to such political or constitutional events that we must look for an explanation of the curious form which, as we have seen, it ultimately assumed. These events can be conveniently grouped under the two heads of royal policy and the growth of Parliament.

(*a*) *Royal policy.* Henry II. dreaded, not national rebellions, but feudal disorder. In consequence his policy was, in all departments of government, anti-feudal. We have already seen that his royal courts began the process of subtracting jurisdiction from the feudal courts; and it is clear that to suppress disorder he needed a disciplined band of paid soldiers. It was therefore to his interest to push much further than had been done before the policy of commuting military service for money payments. For other reasons the tenants in chief themselves found it to their interest also to accept money payments from their mesne tenants instead of military service. In a more orderly state of society money was more useful than armed retainers. Moreover, the free dealing with land which, as we shall see, was encouraged by the royal courts[1] was making personal service impossible. Knights' fees were so split up that the service due could only be expressed in terms of money.[2] Both the king and the tenants in chief therefore favoured commutation. The tenant in chief paid the king a sum which never seems to have been definitely fixed.[3] The king allowed the tenant in chief who had paid to levy scutage from his mesne tenants.[4] As we might expect, Henry II. was careful that, in the process of commutation, the king's interests did not suffer. We have seen that if the tenant in chief enfeoffed more knights than he owed he might make a profit out of a levy of scutage.[5] From Henry II.'s point of view such a profit was a diversion to private uses of money which should have

[1] Below 77-78.

[2] P. and M. i 235, "Already in Henry II.'s reign we hear of the twelfth, the twenty-fourth part of a knight's fee; in John's reign of the fortieth;" cp. Y.B. 11, 12 Ed. III. (R.S.) 64—knight service might be combined with the service of ploughing and still be knight service.

[3] Red Book of the Exchequer (R.S.) ii clix, "What the nature of the service or what the equivalent that was rendered by the tenant in chief to the crown we have absolutely no clear information."

[4] Ibid clx, "Scutage was a contribution paid by the tenants whose service was neither expected nor desired by their lord, and had little to do with his personal service or with any special bargain with the crown for commutation thereof. In this aspect the lord appears as a sort of middleman in connection with the assessment of a scutage. He kept the crown informed of the exact liabilities of his subtenants, and contracted as it were by payment of personal service, or of a *donum*, fine, *promissum*, or 'scutage' for their scutages, which were thereupon recognized as his scutages."

[5] Vol. ii 183-184; above 40.

helped to defray the cost of national defence. It was for this reason that in 1166 he required all tenants in chief to inform him (1) how many knights had been enfeoffed before the death of Henry I.; (2) how many had been enfeoffed since; (3) how many remained to be enfeoffed to satisfy the service due for the land. When the returns were sent in the king could see whether his tenants had enfeoffed more knights than were required to fulfil the service due for the land. If he found that they had enfeoffed more, he increased the service due to that extent.[1] Though, therefore, the king had no direct interest in the scutages due from the mesne tenant to the mesne lord he was determined that the mesne lord should not appropriate to himself all the increase in profits—all the "unearned increment"—of the land; and it is easy to see that such a policy tended to stop the growth of this tenure, because it meant that the mesne lord could get no profit out of either the military service or the scutage taken in lieu thereof.[2]

In course of time the direct interest of the king in the scutages payable by the mesne tenants tended to increase. From Henry III.'s reign onwards the tenants in chief sometimes granted to the king the scutage of their tenants.[3] The king then levied the scutage through the sheriff just as if it had been a national tax. In fact, the decay of feudal jurisdiction made it increasingly difficult for a lord to collect his scutage without the aid of the sheriff.[4] If lands escheated to the crown, the tenant held these lands from the crown *ut de honore*.[5] The scutages formerly payable to the mesne lord were now payable to the king.[6] If the king made a grant of a manor to be held of himself by knight service, the grantee was answerable for scutage; but he could not exact such scutage from the tenants of the manor if they had not rendered military service to the king when part of his demesne.[7] The

[1] Round, Feudal England 236-246; to take an example at p. 242, Walter de Aincurt returns 24 fees *de veteri*, 5 *de novo*, and 11 *super dominium*. In 1168 the Exchequer records him as paying on 35 fees *de veteri* and on 5 *de novo*.

[2] Red Book of the Exchequer (R.S.) ii ccxxxv, vi, "In Normandy, as elsewhere on the continent, this custom [of enfeoffing more knights than were needed to perform the *servitium debitum*] receives its chief encouragement from the prevalence of private warfare. In England it seems to have been used chiefly as a means of seignorial extortion, which was practically interdicted in the reign of Henry II. by the simple device of rendering the tenant in chief liable for scutage on one and all of his improvident enfeoffments. . . . We have in the next century the strange spectacle of a distraint of knighthood to restore the shrunken proportions of military service."

[3] Ibid clx; Stubbs, C.H. ii 64 n. 2.

[4] Madox, Exchequer i 675, 679, 680 n. *m*; in a note in Y.B. 33-35 Ed. I. (R.S.) 234 the need for such a writ in all cases seems to be assumed; similarly the lord could take proceedings in the king's courts to collect his aids, below 66.

[5] Above 41 n. 2.

[6] Madox, Exchequer i 652, citing two cases of Edward II.'s reign.

[7] Ibid 678 n. *i*.

ultimate effect of the statute Quia Emptores was to increase the number of persons who held directly of the king—to increase therefore the number of cases in which the king was directly entitled to scutage. For these reasons scutage becomes far more important than the fines payable by the original tenants in chief for not performing their *servitium debitum*. Scutage is mentioned specifically by Littleton, and by the Act which abolished tenure by knight service in Charles II.'s reign ;[1] whereas there is hardly a hint in either place of the fines payable by the tenant in chief.[2] One of the last references to the personal liability of tenants in chief seems to be in an Act of 1503 which provided that persons having lands of the king's gift should forfeit them if, without reasonable excuse, they omitted to "geve theyr dayly attendaunce in their persones upon his Highnesse when he shall fortune to goo in Warres within this his Realme or elsewhere . . . in his personne."[3] But this was a different and a less onerous liability, as it did not apply to tenants who had purchased their lands of the king.[4] It is no doubt for these reasons that it came to be thought that scutage had always been merely the sum paid by all tenants by knight service—whether tenants in capite or mesne tenants—as commutation for their military duties. As we have seen, this came to be substantially true by a very gradual process, but we shall now see that even before this process was complete, scutage had ceased to be levied for reasons now to be considered.

(*b*) *The growth of Parliament.* The inquest of 1166 showed, as we have seen, that the king wished to share any surplus profits made by his tenants in chief. The Charter of 1215[5] introduced a clause which limited the king's rights in this respect. For the future no scutage was to be imposed, "nisi per commune concilium." This clause was not repeated in the reissue of the charter in 1216 ; but in 1217 it was provided that scutage should be taken "sicut capi consuevit tempore Henrici regis avi nostri."[6] But in fact consent to a levy of scutage was usually asked ;[7] and when the constitution of Parliament became fixed, Parliament claimed to exercise the same control over the levy of scutage as it claimed to exercise over the other forms of direct taxation.[8] As a result

[1] 12 Charles II. c. 24.

[2] § 2 of the statute mentions "tenure by homage, escuage, *voyages royal*, and charges for the same ;" it may be that the term "voyages royal" is a reminiscence of these payments ; cp. Litt. § 95.

[3] R.P. vi 525-526 (19 Hy. VII no. 4). [4] Ibid 526. [5] § 12.

[6] § 44 ; Stubbs, C.H. ii 28 n. 2. [7] Ibid 28 n. 2, 32 n. 1, 64.

[8] Ibid 569, "The scutages so frequent under John and Henry III. had ceased to be remunerative. The few taxes of the kind raised by Edward I. seem to have been collected almost as an afterthought, or by a recurrence to the old idea of scutage as commutation for personal service . . . The scutages of the 28th, 31st, and 34th years of the reign appear so late in the reign of Edward II. as to seem nothing better than a lame expedient for pecuniary exaction ;" see E.H.R. xxxvii 324 seqq.

scutage seems to have been superseded by other and newer forms of taxation. There is one instance of its levy in Edward II.'s reign, and another in Edward III.'s reign.[1] It was remitted in 1385 by Richard II.[2] After that we hear no more of it except its formal abolition in 1660.[3]

Thus by the fourteenth century tenure by knight service had ceased to provide either soldiers or their pay. The armies which fought in the Hundred Years' War were armies of paid soldiers, raised by contracts made between the crown and the great nobles.[4] The money payments for which the actual military service had been commuted had come to depend on parliamentary grant. Their amount was not sufficient to keep on foot an army for foreign war; and Parliament preferred, and in fact was obliged, to raise the money required for such an army in other ways. "If," says Maitland, "tenure by knight service had been abolished in 1300 the kings of the subsequent ages would have been deprived of the large revenue that they drew from wardships, marriages, and so forth; really they would have lost little else." [5]

The history of tenure by knight service is, as I have said, a history of the gradual disappearance of the elements in it which once gave it importance in public law, and of its gradual conversion into a form of land-holding and nothing more. It is because its history has taken this course that English law, although it knows a barony or an honour, knows no tenure by barony.[6] The baron paid a higher relief;[7] but except in that one point there is nothing to distinguish his tenure from tenure by knight service. From the first it was not the quality but the size of the holding which distinguished the baron from other tenants in chief of the crown. No doubt a holding of a certain size in 1215 entitled the baron to an individual summons to the commune concilium. But as tenure of land came to be more and more a matter of private law merely, the barony by tenure came to look more and more anomalous, and as we have seen, it finally disappeared.[8] From this point of view its disappearance is a phenomenon of the same kind as the disappearance of the military duties involved in tenure

[1] See P. and M. i 232 n. for a list of scutages levied.
[2] Stubbs, C.H. ii 569.
[3] 12 Charles II. c. 24 § 2.
[4] Stubbs, C.H. iii 582, 583.
[5] P. and M. i 256.
[6] Ibid 259; on the whole subject see Tait, Manchester 182-197; for the "honour" see Vinogradoff, English Society 348, 349.
[7] Below 60.
[8] Vol. i 357 and n. 11. In early days the honours and baronies were kept intact because, as Challis says, to have severed them "would have disarranged both the political and the military organization of the kingdom," Real Property 5 n. However, this was occasionally done; see instances from the reigns of Henry II. to Edward I., Madox, Bar. Angl. 44-50. In later days, when this reason ceased to apply, when such tenure became merely a matter of land-holding, "land-baronies were divided and subdivided till at length they were brought to nought," ibid 59.

by knight service. Both illustrate the passing of the feudal ideas which connected the government of the state with the holding of land.

(iii) Serjeanty.

Serjeanty means service. The serjeant means primarily one who serves. As we have seen, those who follow and serve the law are the serjeants-at-law. Tenure by serjeanty means, therefore, tenure by service. All the tenures imply service of some sort. Indeed, the whole of mediæval society is held together by the services of tenants—the church is endowed, the kingdom is defended, the land is cultivated. But that which distinguishes the service of one who holds by serjeanty from the service of one who holds by the other tenures is the fact that the service of the serjeant is a pre-eminently personal service. We at the present day sometimes use the term "service" to mean the calling of the domestic servant—we talk of going into service—though we know well that all employment involves service. When we use the term "service" in this restricted sense we mean to emphasize the same personal or domestic character of the employment as the lawyer of the twelfth and thirteenth century emphasized when he talked of tenure by serjeanty.[1]

The tenants by serjeanty are no doubt the descendants of the servientes of Domesday Book, who held land in many counties as the servants, in many capacities, of the king and the great nobles[2] —in so many capacities that Domesday Book rarely states the precise nature of their services.[3] By the end of the twelfth century we can see from Glanvil that the tenure of the serviens has become the special tenure by serjeanty;[4] and, even when the personal service due from other tenants had become a thing of the past, the personal character of the service due from the serjeant, or serviens, remained, and accounted for many of the peculiar features of the tenure as it existed in the thirteenth century. Thus the service could not be commuted for a money payment, and therefore no scutage was due.[5] The land held by serjeanty, because it was held in return for personal service, used

[1] P. and M. i 262, 267.

[2] Ibid 268, 269, "Among the Wiltshire *Servientes* are three chamberlains (*camerarii*), a hoarder (*granatarius*), and a cross-bowman (*arbalistarius*); elsewhere are an archer, an usher, a goldsmith, a baker, a bedchamber man . . . there can be little risk in finding the ancestors in law of Bracton's *rod knights*, and the abbot of Ramsey's *ridemanni* in the *radchenistres* and *radmanni* of Domesday Book."

[3] Ballard, Domesday Inquest 105; cp. Vinogradoff, English Society 60-62; see ibid 72-74 for the "Francigenæ" class of servientes, who were chiefly of the military sort.

[4] Vol. ii 201.

[5] Litt. § 158; cp. McKechnie, Magna Carta 55-56.

to go back to the donor when the tenant died; and though in the thirteenth century such land descended to the heir, we can see a reminiscence of the older idea in the fact that the relief was arbitrary.[1] When hereditary succession was allowed, the land was never partitioned—even when daughters inherit—because such personal service cannot be partitioned.[2] Though the tenants of lands held by other tenures acquired the right to alienate, lands held by serjeanty long remained inalienable.[3] In such rules as these we see not only striking illustrations of the meaning and character of this tenure, but also the survival of older ideas which once shaped some of the incidents of the other tenures—especially tenure by knight service—in the days when the services due for land were really personal services, and not merely the performance of duties which could be performed by deputy or commuted for a money payment.

In the twelfth and thirteenth centuries tenure by serjeanty still covered a wide field. Lands were held by this tenure both of the crown and of mesne lords,[4] and the services reserved were very various. We may divide these services into two main classes—those which were not military and those which were military.

The non-military class.

Of the non-military serjeanties we must place first the various species of service owed to the king by his tenants in chief holding by this tenure. Among these tenants the great officials of the kingdom or the royal household, who held the great hereditary serjeanties, take the first place. "Tenant by Grand Serjeanty is where a man holds his lands or tenements of our sovereign lord the King by such services as he ought to do in his proper person to the King, as to carry the banner of the King, or his lance, or to lead his army, or to be his marshal, or to carry his sword before him at his coronation, or to be his sewer at his coronation, or his carver, or his butler, or to be one of the chamberlains of the receipt of his Exchequer, or to do other like services, etc."[5] Already in the thirteenth century they were regarded rather as conferring dignity than as involving service. In 1236, when Henry III.'s queen was crowned, there was much dispute among the magnates as to who was entitled to bear a sword before the

[1] Bracton f. 84b; it had become fixed by 1410, Y.B. 11 Hy. IV. Trin. pl. 9, cited P. and M. 270 n. 3; Litt. § 154.

[2] P. and M. i 270 n. 4. [3] Ibid 315, 316.

[4] Ibid 265; Bracton f. 35b, "Item poterit quis feoffare alium per serjanteriam quæ quidem multiplex esse poterit et unde quædam pertinent ad ipsum dominum feoffantem, et quædam ad ipsum regem."

[5] Litt. § 153.

king, and as to who was entitled to act as his seneschal.[1] We see the causes at work which will give to these honourable services a longer life than the actual tenure. Besides these great serjeants many tenants held by the tenure of doing an almost infinite variety of humbler services. There are serjeanties connected with hawking and hunting, with the forests, with carrying duties, with bee-keeping, with agricultural duties, with eating and drinking, with the washing and drying of clothes, with various branches of the civil service.[2] In fact, the list of serjeanties comprises most of the needs of the royal household, and many of the needs of the government of the state.

What the king does the magnates imitate. Their personal needs, and the staff required to administer their estates, were supplied by letting lands to be held by serjeanty. There were the servants who looked after the household accounts, the wardrobe, the kitchen, and the person of the lord; there were the servants who looked after the agricultural arrangements of the estate; and there were the servants who looked after the jurisdictional rights involved in the manor.[3] The importance of this class of tenants by serjeanty was very great. It is difficult at the present day, as Sir Paul Vinogradoff has pointed out, to realise this importance. "We live in a time of free contract, credit, highly mobilized currency, easy means of communication, and powerful political organization. . . . Every feature of the mediæval system which tended to disconnect adjoining localities, to cut up the country into a series of isolated units, contributed at the same time to raise a class which acted as a kind of nervous system, connecting the different parts with a common centre, and establishing national intercourse and hierarchical relations. The *libertini* had to fulfil kindred functions in the ancient world, but their importance was hardly so great as that of mediæval serjeants or *ministeriales*. . . . The first cook and gatekeeper of a celebrated abbey were real magnates who held their offices by hereditary succession, and were enfeoffed with considerable estates. . . . At every step we find in the cartularies of Glastonbury Abbey proofs of the existence of a numerous and powerful 'serjeant' class."[4]

[1] Red Book of the Exchequer (R.S.) ii 756, 757—"Factæ sunt contentiones magnæ de servitiis ministerialium domus Regis et de juribus pertinentibus ad eorum ministeria."

[2] Ibid 451-468, De Serjantiis in Diversis Comitatibus Angliæ.

[3] Vinogradoff, Villeinage 317-320; cp. Bracton f. 35b, "Servitia tenendi placita dominorum suorum, vel portandi brevia infra certa loca, vel pascendi leporarios et canes, vel mutandi aves, vel inveniendi arcus et sagittas, vel portandi, et de iis serjantiis non poterit certus numerus comprehendi;" cp. Eynsham Cart. i, nos. 328, 360, 365, 391, 453, 496, 542, 544.

[4] Villeinage 323, 324; for this class of ministeriales in Germany see Schulte, Histoire du Droit D'Allemagne (Tr. Fournier) 269-272.

The military class.

In the twelfth and thirteenth centuries the military serjeanties were as important as those which were non-military. They supplied the feudal army with light auxiliary troops, with attendants upon the fully-armed knights, with material for war, with "the means of military transport."[1] Such services as these were due, not to the king only, but also to the mesne lord. The lord, when he went to war in person, needed serjeants to attend upon him; and at all times the want of an adequate police force necessitated a retinue of followers to protect person and property.[2] The military service of these humbler members of the feudal army had perhaps a longer life than the military service of the tenant by knight service; but it too disappeared. "Such a tenant ought not to go, nor do anything in his proper person touching the war."[3] It became merely a duty to supply certain small munitions of war.[4] For all that the tenure retained, even then, a slightly more direct connection with war than tenure by knight service; and in the popular language of modern times the serjeant, unlike the knight, is still connected with the army.

We must now turn to the causes which led to the decay of this tenure. The system of paying servants by granting them land to be held by serjeanty was in many ways inconvenient and costly. The office and the land became hereditary. We get that confusion between office and property which was long an effectual hindrance to efficiency and reform both in the judicial and in many other departments of the state.[5] This confusion can be seen not only among the serjeanties held of the crown, but also among those held of mesne lords. "John of Norwood, abbot of Bury St. Edmunds, had to resort to a regular *coup d'état* in order to displace the privileged families which had got hold of the offices and treated them as hereditary property."[6] We were not surprised, therefore, to find that in the fourteenth century there is a growing tendency to substitute the contract with the hired servant for the status of the tenant who holds by serjeanty; and in many cases the tenure by serjeanty is turned

[1] P. and M. i 264, 265; Bracton f. 36, "Per servitium inveniendi domino regi . . . unum hominem et unum equum et saccum cum brochia pro aliqua necessitate vel utilitate exercitum suum contingente."

[2] See Bracton's Note Book case 758—the case of the abbess of Barking, who had thirty tenants who "solent ire cum Abbatissis vel cum senescallis suis quo ipse voluerunt ad maneria sua." As Sir Paul Vinogradoff points out, some of the "milites" mentioned in D.B. were probably tenants by serjeanty of later law, English Society 77-79; the Anglo-Saxon thane—the predecessor of the "miles"—really occupied this double position, ibid 403, 404.

[3] Litt. § 160; if the duty was to find a man to go to war or to go in person the tenure was grand serjeanty, ibid § 157.

[4] § 159, "Small things belonging to war."

[5] Vol. i 246-250, 424-425.

[6] Vinogradoff, Villeinage 325.

into tenure by socage.[1] Both the king and the mesne lord found it paid better to take rent for their lands and to hire servants than to enfeoff tenants to hold by serjeanty.[2] It is clear that this change in the economic ordering of society tends to destroy the largest and perhaps the most powerful class of the tenants by serjeanty.

As a result little was left of tenure by serjeanty except the tenure of those who held by the dignified serjeanties of performing various ceremonial services for the king on solemn occasions, and the tenure of those who held by doing some service pertaining to war. Already in Britton's day serjeanty was specially but not exclusively connected with war;[3] and when once this connection had been established it is easy to see how the idea arose that all tenure by serjeanty must be tenure in chief.[4] Such warlike services could, according to the established principles of English law, only be rendered to the crown.[5] Britton, who connects the services involved in serjeanty with war, seems to hint that tenure by serjeanty must be tenure in chief.[6] Both these ideas had hardened into fixed rules when Littleton wrote.[7]

It is clear that there is a broad social line between these two surviving cases of tenure by serjeanty. This difference is expressed by the use of the terms "grand" and "petit." These terms are used both by Bracton[8] and by Britton.[9] But they are not yet technical terms which express two settled varieties of the same tenure; they express rather the substantial difference between the nature or kind of the services due.[10] That they came to have a technical meaning was probably due to the need for settling the question whether tenure by serjeanty gave rise to the incidents of wardship and marriage.[11] In the charter of 1215 John had promised that he would not claim wardship on account of any "small serjeanty."[12] As the greater number of the older

[1] P. and M. i 315—Serjeanties which had been alienated were arrented, i.e. changed into knight's service or socage; cp. Eynsham Cart. i, no. 459.

[2] See below 205, for a similar process in the case of the villein tenants; Madox, Form. nos. 176, 183, gives specimens of deeds by which men were retained for a fixed sum.

[3] ii 5 and n. *a* from MS. *N*; cp. ibid 10—"to be keeper of our goshawks" is given as an illustration of grand serjeanty.

[4] Litt. § 161. [5] Above 39.

[6] ii 10 and n. *g*; cp. Bracton f. 35b, "Sunt et alia genera serjantiæ quæ ad dominum capitalem non pertinent sed ad dominum regem pro exercitu regis ad patriæ tuitionem."

[7] §§ 158, 161. [8] ff 35b, 87b; cp. P. and M. i 304. [9] ii 5, 10.

[10] The great "secundum quosdam" are worth 100s.; the small are worth half a marc, or 5s.

[11] P. and M. i 304.

[12] § 37, "Nos non habebimus custodiam heredis vel terræ alicujus, quam tenet de alio per servitium militare, occasione alicujus parvæ sergenteriæ quam tenet de nobis per servitium reddendi nobis cultellos, vel sagittas, vel hujusmodi;" the clause is repeated in subsequent re-issues.

serjeanties dropped out, leaving only the serjeanties performed by the great nobility on state occasions, and the smaller military serjeanties, it would be natural to refer the words of the charter to the latter class, and to infer that they did not apply to the former class. Thus tenure by the latter class of serjeanty came to be "but socage in effect;"[1] while tenure by the former class came to be similar to tenure by knight service, till it too was turned into tenure by socage.[2] The honorary services due from the tenant by grand serjeanty were preserved by the Act of Charles II.,[3] and are the last traces of a tenure which once covered many diverse relationships—political, social, and economic.

(iv) Socage.

At the end of this period free socage has become the tenure by which all freehold lands are held if they are not held by frankalmoin, knight service, or serjeanty. This negative characteristic of the tenure is clearly brought out by Littleton.[4] It is clear from his account that we can say much as to the services and incidents which are not due from the socage tenant; but that we can say little about the services which are due. Military service or scutage is not due;[5] and above all there is no wardship and marriage.[6] Generally a money rent is due,[7] and occasionally agricultural services.[8] This rent may be nominal or substantial;[9] it may consist in the gift of some thing of real value, e.g. a pound of pepper, or of merely nominal value, e.g. a rose. Sometimes no rent at all, but only fealty, is due.[10] But it is only gradually that tenure by socage has attained these characteristics.

The term "*soc*" is, as we have seen, connected with the word "seek."[11] That which the socman must seek is his lord's *soke* or jurisdiction. He is therefore a man who, because he must seek his lord's court, is dependent in some manner upon him. These socmen appear in Domesday in the Danish districts; and socage describes their tenure. Often they were bound to perform agricultural services; and this no doubt led both Bracton[12] and Littleton[13] to the erroneous belief that the word "socage" was connected with the French *soc*, a ploughshare.

[1] Litt. § 160; cp. Bracton f. 87b.
[2] 12 Charles II. c. 24.
[3] Ibid § 7.
[4] § 117, "Tenure in socage is where the tenant holdeth of his lord the tenancy by certain service for all manner of services, so that the service be not knight service."
[5] §§ 120, 211.
[6] §§ 123-125.
[7] § 117.
[8] § 119, "And in divers places the tenants yet do such services with their ploughs to their lords."
[9] P. and M. i 274.
[10] Litt. §§ 128, 129, 130, 131.
[11] Vol. i 20; Vinogradoff, Villeinage 196; English Society 125 n. 1.
[12] f. 77b, "Et dici poterit sockagium a socko et inde tenentes qui tenent sockagio sockemanni dici poterunt eo quod deputati sunt, ut videtur, tantummodo ad culturam."
[13] § 119.

In the days before the royal courts had created the four great types of free tenure the variety of the classes of these socmen was very great. In fact, we have socmen of all kinds, from the substantial rent-paying tenant to the tenant bound to perform labour services and perhaps personally unfree.[1] It is for this reason that the great dividing line between free and unfree tenure cuts through this class. The law retained traces of the fact that the line had been drawn through it in the existence of both villein socage and free socage.[2]

Primarily then the tenant by free socage is a dependent tenant; and his services are generally connected with agriculture.[3] He pays rent for land which he cultivates, or he performs labour services, or he does both. We can see from Glanvil that the conditions of his tenure are not yet assimilated to the conditions of the other free tenures. The succession to his land is still governed by local custom; the period when he attains full age is not fixed;[4] and we can still see traces of these differences in the time of Bracton.[5] At the end of the thirteenth century it is clear that the rights and powers of a tenant holding by free socage have come into line with the rights and powers of the tenants holding by the other free tenures. But because it is not a tenure which is connected with war no military service is due, and no scutage.[6] For the same reason the lord cannot assert that he has that paramount interest in the wardship and marriage of the infant heir of his socage tenant which, in the days when tenure by knight service was really a military tenure, gave him these rights over the infant heir of his military tenant.[7] Whatever doubts there may have been as to this latter principle, it is by implication asserted in the Charter of 1215.[8]

In the twelfth and thirteenth centuries the tenant who held simply at a rent would not necessarily have been called a tenant in socage. He might have been called a tenant in fee farm. "To hold in fee farm means to hold heritably, perpetually, at a rent; the fee, the inheritance, is let to farm."[9] Tenure by fee

[1] Vinogradoff, Villeinage 196-203; cp. Bracton ff. 7, 7b as to the different classes on the royal demesne.

[2] Ibid ff. 77b, 78.

[3] Ibid f. 86b, speaking of the different ages at which different classes of tenants attain majority, he says that the heir of the socman is of full age when he has the strength and knowledge needed "ea exercere quæ pertinent ad agriculturam."

[4] viii c. 3; vol. ii 201; below 510; as Sir Paul Vinogradoff says (English Society 40), "Socage tenure proceeded from an older stratum of law than the feudal one."

[5] E.g. ff. 86, 86b.

[6] There is a small exception in favour of "escuage certain," i.e. a sum fixed once for all, and not assessed on each occasion by Parliament, Litt. § 120.

[7] Below 65-66.

[8] § 37, above 50 n. 12.

[9] P. and M. i 273, 274.

farm appears as a separate tenure in Magna Carta,[1] in Bracton,[2] in Britton,[3] and in the Old Tenures.[4] Probably such tenants would be a higher class of rent-paying tenants—men who had nothing to do with agricultural work. In the course of the fourteenth and fifteenth centuries fee farm becomes merged in socage.

The cause possibly was the fact that the agricultural services of the socage tenant were being generally commuted for money payments.[5] The same cause which was fatal to the military duties of the tenant by knight service, which destroyed the most important class of tenants by serjeanty, which played some part in the substitution of the copyholder for the villein, operated to destroy any real distinction between the tenant by fee farm and the tenant by free socage. It was the most important class of the socmen, the class which were least burdened with labour services, which thus became the tenants by free socage.[6] In many cases they had always paid some rent, and very probably they would be the first to feel the effects of the movement in the direction of commutation. Thus tenure by free socage comes to embrace not only the class of well-to-do farmers, but also all the classes who hold at a rent—whether that rent be onerous or merely nominal. It includes not only "tenants holding merely under lease at a rent," but also the great landowners of the kingdom. So wide a tenure can only be described, as Littleton described it, by negative characteristics;[7] and it is exactly these negative characteristics which caused it to be highly valued, for they gave the tenant exemption from scutage and wardship and marriage. It was the least encumbered of all the tenures with obsolete and oppressive incidents, reminiscent of an older day when land-holding involved public rights and duties as well as private rights of ownership. It was because it fitted in best with the newer ideas which regarded land-holding simply as a form of property that it finally superseded all the other free tenures.[8]

Tenure in burgage is only a variety of tenure in free socage. It is the tenure of those who hold land freely in the boroughs.[9] In many cases its incidents have been affected by the particular custom of the borough in which it is situate.[10] It sometimes

[1] (1215) § 37. [2] f. 86. [3] ii 11. [4] At p. 92.

[5] Vinogradoff, Villeinage 178-181; below 205.

[6] Vinogradoff, Villeinage 308, 309.

[7] As early as Britton (ii 11) it is so described—"Sokemanries are lands and tenements which are not held by knight service, or by grand or petty serjeanties;" we may note that he thinks that they are "enfranchised" lands—they are held "by simple services, as lands enfranchised by us or by our predecessors of our ancient demesnes."

[8] 12 Charles II. c. 24.

[9] P. and M. i 275, 276; Litt. § 162, "Such tenure is but tenure in socage."

[10] Litt. § 165, "Also for the greater part such boroughs have divers customs and usages which be not had in other towns."

contains survivals and reminiscences of old rules and ideas which have disappeared in the country at large because the country at large is subject to the common law alone. Some of these peculiarities I shall notice when I deal with certain variations from the general rules of the land law.[1]

The Incidents of the Free Tenures

The services due from the tenant mark out the guiding lines of the different types of tenure. We must distinguish from these different services the incidents which are dependent upon them.[2]

Blackstone[3] enumerates as the incidents of tenure aids, relief, primer seisin, wardship, marriage, fines for alienation, and escheat. I shall deal with the whole subject of freedom of alienation in the next section. Here I shall deal with the other incidents of tenure as enumerated by Blackstone, and also with some of its other consequences in the following order: (i) homage and fealty; (ii) relief and primer seisin; (iii) wardship and marriage; (iv) aids; (v) escheat and forfeiture.

(i) Homage and fealty.

Homage is the ceremony which makes the tenant the man of his lord.[4] The oath of fealty is the oath which the tenant swears to be faithful to his lord.[5] "Fealty," it is said in a Year Book of Edward I.'s reign, "does not make the tenant; for that is only an acknowledgment of the services: but homage makes the tenant."[6] If a tenant holds several pieces of land of different lords he can only perform unconditional or liege homage, he can only swear unconditional fealty, to one of these lords. That lord is called the liege lord. He is usually the lord who or whose ancestors made the most ancient of these feoffments. When homage is done or fealty is sworn to the other lords a saving must be made of the duty to the liege lord.[7]

All free tenants must take an oath of fealty to their lords; and such an oath might be exacted at the present day. Homage, on the other hand, when we first read of it, was a ceremony only performed by the military tenant,[8] and it could not be performed

[1] Below 269-275.

[2] Y.B. 20, 21 Ed. I. (R.S.) 132 *per* Tiltone *arguendo*, "Relief is not a service, but dependent on a service;" cp. 3, 4 Ed. II. (S.S.) 96, 99 *per* Scrope *arg.*

[3] Comm. ii 63.

[4] For the ceremony see Bracton f. 80; Britton ii 37; Litt. § 85; Y.B. 15 Ed. III. (R.S.) 446.

[5] Bracton f. 80; Britton ii 39, 40; Litt. § 91; it tells us nothing of the services which may be due, Y.B. 18 Ed. III. (R.S.) 318.

[6] Y.B. 21, 22 Ed. I. (R.S.) 240.

[7] P. and M. i 279; Glanvil ix c. 1; Litt. § 89.

[8] Bracton ff. 77b, 78; but in Bracton's day the socage tenant often performed it, P. and M. i 286, 287.

by a woman.[1] Its performance brought into existence many important rights and duties. Its history, like that of the military tenures, is a history of decay; and the cause of its decay is that elimination from the land law of the public elements originally contained in it which has already been noted in dealing with the history of the free tenures.

In the older law, represented in the Laws of Henry I., the ceremony of homage put the military tenant under the duty of aiding and protecting his lord, with his life it may be, of honouring him, and of faithfully serving him against all men. Such a tenant was a member of the lord's court and council, and as such had a share in the government of the fief. On the other hand, the lord was under the duty of protecting the tenant, and of defending him with his name and power against attacks, whether those attacks took the form of legal proceedings or of open force.[2] The lord is far more than a landlord. The tenant owes many other and different duties than a mere tenant. Lord and tenant are related rather as ruler and subject. The state is weak. The man wants protection and the lord retainers.[3] The ceremony of homage cements those associations of lords and men which, in the days of the weakness or the infancy of the state, of necessity assume many public duties, and cause landowning to be a matter of public law. It is for this reason that the breach of the obligations involved in homage is the most heinous offence known to the law.[4] It is the essence of felony, in the earliest sense in which that term was used;[5] and it is, as we shall see, one of the most primitive of all the different ideas which have gone to the making of our law of treason, because these obligations are the bond which knits the feudal state.[6] In England we must look to old compilations like the Laws of Henry I., or to continental analogies, if we would understand the significance of homage, because in England the rise of the common law necessarily involved a diminution in its importance. But in spite of the activity of the common law we can see from the disorder of the fifteenth century that the political ideas which underlay the old conception of homage still lived on. Legal rules, which run counter to the prevalent ideas

[1] Glanvil ix c. 2.

[2] P. and M. i 280, 281, and passages from the Leges Henrici there cited, 287; French law, because feudalism was stronger, gives us the best idea of the older consequences of homage, see Esmein, Histoire du Droit Français 218-224; the mutual obligations of lord and man are well brought out in Glanvil's definition (ix c. 4), "Mutua quidem debet esse dominii et homagii fidelitatis connexio, ita quod quantum homo debet domino ex homagio, tantum illi debet dominus ex dominio præter solam reverentiam;" cp. Y.B. 3, 4 Ed. II. (S.S.) 7 *per* Bereford, C.J.

[3] Maitland says of the ceremony, "Everything seems done to tell us that the man has come helpless to the lord and has been received into the lord's protection," P. and M. i 278.

[4] Leg. Henr. 75. 1. [5] Vol. ii 357-358. [6] Below 287-288.

of the age, must be rigidly applied for many years before they bring about a reform of these prevalent ideas, and create an instinctive preference for different ideas in harmony with themselves. During the whole of this period this change was gradually and silently taking place. The public element in the land law was being reduced to the lowest dimensions; and thus homage was becoming a mere ceremony of constantly diminishing importance.

The causes and stages of this process may be summarized as follows: (1) With the increase of the power of the state, the duty to the king as supreme lord—the duty of allegiance—takes precedence of the duty to the lord. William I. insisted on the recognition of this principle,[1] and his successors more than maintained his claims.[2] Thus the worst crimes—the felonies and treasons of our later law—come to be offences not against the lord but against the king. They are breaches of the tie of allegiance, not of homage.[3] But, as we shall see, some traces of the older ideas were long preserved in the existence of the crime of petty treason, and in the lord's right of escheat if his tenant committed felony.[4] (2) As we have seen, the supreme control asserted by the courts of common law over all disputes as to the possession of or right to lands held by a free tenure tended to break up the solidarity of the feudal group; and so the bond which once united this group necessarily lost its meaning. (3) As the land law comes to be merely property law the consequences of homage become merely proprietary. It gives rise to duties to warrant the title;[5] and, as its older significance decayed, and as the differences between the free tenures began to fade, the ceremony ceased to be confined to the military tenant. It could be and was expressed in terms borrowed from the Roman law of obligations;[6] and, when the duties of warranty came to be based rather on express covenants than upon the ceremony of homage,[7] it really ceased to have any meaning at all, and was appropriately abolished in 1660[8] with the military tenures themselves.

[1] Saxon Chronicle s.a. 1086, "After that he went about so that he came at Lammas to Salisbury, and there came to him his witan, and all the landowning men of property there were over all England, *whose soever men they were*, and all bowed down to him and became his men, and swore oaths of fealty to him that they would be faithful to him against all other men."

[2] In all the forms of the ceremony (above 54 n. 4) the faith owed to the king is saved.

[3] P. and M. i 284-286; Calvin's Case, 7 Co. Rep. at pp. 4b-6; Bl. Comm. i 369.

[4] Below 69, 288.

[5] Glanvil ix. c. 4; Britton ii 26; Litt. §§ 143-145; below 160.

[6] Bracton, f. 78b, defines it as, "Juris vinculum quo quis astringitur ad warrantizandum, defendendum, et acquietandum tenentem suum in seisina versus omnes per certum servitium in donatione nominatum et expressum; et etiam vice versa quo tenens re obligatur et astringitur ad fidem domino suo servandam et servitium debitum faciendum;" cp. above 55 n. 2.

[7] Below 161.

[8] 12 Charles II. c. 24.

In the history of homage and fealty we may see in little the history of two important tendencies of our land law. Homage represented the public element in feudal law. Because it did so, it decayed, and disappeared together with the tenures and those of their incidents which were characteristic of that older state of society of which it had once been the bond. Fealty represented the bond between lord and tenant. Its retention bears witness to that universality of tenure[1] in our land law which was secured by the very cause which was fatal to homage—the existence of a central court strong enough both to repress the elements in feudalism which were hostile to the development of the state, and to make the feudal conception of land tenure the common law of the land.

(ii) Relief and Primer Seisin.

The dependency of the man upon his lord was, as we have seen, the result of many different causes. The various types of tenure known to the law represented many different kinds of bargain between the contracting parties.[2] According to the nature of the bargain the right of the heir of the tenant to succeed to the land of his ancestor will be stronger or weaker. In the eleventh and twelfth centuries the heir of the tenant by knight service has, as a rule, the right to succeed to the lands of his ancestor—but upon terms. With the development of the common law the rules for the military tenant are extended to all free tenants, and the terms attain fixity. These terms become the incidents of tenure known as relief and primer seisin.

I shall discuss here the origin of the relief, the spread of the relief to all free tenures, the manner in which its amount came to be fixed, and the manner in which the rights of the lord and the heir were adjusted.

In dealing with the origin of the relief we must at the outset distinguish the relief from the heriot. We have seen[3] that, at the time of the Conquest, the man was expected to give his lord an heriot at death. This heriot—the arms of the thegn, the stock of the peasant, perhaps the gift to the lord that he may recognize the will of his tenant[4]—represent in theory the return to the lord of the capital which he has advanced to his tenant. The relief, on the other hand, represents the sum paid by the heir to the lord that he may succeed to the property of his ancestor.[5] In the case

[1] Vol. ii 199.
[2] Ibid 200; vol. i 21-23.
[3] Vol. ii 75.
[4] Ibid; Bracton f. 86.
[5] Ibid f. 84, when homage and fealty have been taken, the "hæreditas, quæ jacens fuit per eorum decessum, relevetur in manus heredem, et propter talem relevationem, facienda erit ab heredibus quædam præstatio, quæ dicitur relevium . . . fit quædam præstatio, quæ non dicitur relevium, sed quasi, sicut heriettum;" cp. Y.B. 17, 18 Ed. III. (R.S.) 322, where it is said that relief should be taken before homage; for relief in D.B. see Vinogradoff, English Society 224, 243.

of the greater military tenants there can be no question of the advance of arms or stock. Their lands have been granted to them in return for public services past and future. From the time of the Conquest it has been recognized that these lands will descend to the heir of the tenant. But the heir must pay a relief in recognition of the lord's seignory. The land was originally given by the lord to the tenant; but the lord does not want to seek a new tenant whenever an old tenant dies. The heir is the obvious person to take the land. He is willing to pay something to be allowed to succeed. The outcome is the recognition of hereditary right in return for the payment of the relief. It may perhaps be said that, if this is the origin of the relief, we should expect to find that when a remote heir succeeds a larger sum is charged than when a near heir succeeds. It is not so much to the advantage of the lord to allow a remote heir, whom perhaps he does not know, to become his tenant, as to allow a son, with whom perhaps he has grown up, to have the land. He might be better off if he enfeoffed a stranger. In France there are traces that the relief varied upon this principle.[1] That we have no trace of such variation in England is due, perhaps, to the fact that the centralized administration of the law made for simplicity in its rules. And the view that it is these conflicting, but not adverse, interests of lord and tenant which supply the key to the origin of the relief gains perhaps additional probability by the fact that a relief was never payable by the tenant on the death of the lord. It may be that in the past, when the tenant's holding was regarded as entirely precarious, and before there was much fixed law on these matters, the new lord exacted such a payment.[2] But in the reign of William II. the claim to make this exaction was regarded as wholly illegal.[3] In such a case, indeed, it was really to the interest of the new lord—himself liable to pay a relief and perhaps to pay some of his ancestor's debts—to respect the existing interests of his tenants. He might perhaps induce his tenants to help him pay his relief[4]—but this is an aid,[5] a sum paid by an existing tenant. It is no relief, no payment for the recognition of his status as tenant.

It is with reference to the tenants by military service that we first hear of the relief. Socage shades off into villein tenure;

[1] Esmein, Histoire du Droit Français 227, says that by the thirteenth century relief was paid as a rule only by collaterals, "sans aucun doute, les textes du droit romain, sur les *sui heredes* et la *continuatio dominii* à leur profit exercèrent ici une grande influence."

[2] P. and M. i 298.

[3] Ibid 299; Bracton, f. 84b, says distinctly that it must be paid, "non nisi semel tantum id est quamdiu heres duraverit qui semel relevavit."

[4] Glanvil ix 8.

[5] Below 66; Bracton, f. 85, seems to deny that such an aid can be demanded.

and it was at first perhaps doubtful whether the socage tenant paid relief at all—whether his payment was not rather in the nature of the heriot.[1] But both in Glanvil and in Henry III.'s reign we hear of socage tenants paying reliefs;[2] and, though some of them still paid heriots, it is coming to be thought that this payment should be made only by those who hold by a villein tenure.[3] Probably from the beginning of the fourteenth century onwards it was recognized that the socage tenant paid a relief. In the case of serjeanty the peculiarly personal services due from the tenant hindered, as we have seen, the growth of the idea that lands so held should descend to the heirs.[4] There could be no thought, therefore, of a relief. We shall see that it was not till some time after the reliefs of other tenants had been fixed that any rule was arrived at in the case of tenants by serjeanty. A case decided in 1410[5] implies that they paid a relief; and this is definitely stated by Littleton.[6]

In early days the amount of the relief was no doubt left to be fixed by individual bargaining; and bargaining in that age was generally conducted, not by reference to the abstract law of supply and demand, but rather by reference to the effective fighting force of the contending parties.[7] The growth of a settled system of law, and the need for setting some limit to the avarice of the crown, seem to have been the two causes which led to the definite fixing of the amounts payable. William II. had stretched the rights of the crown to the utmost. We are not surprised, therefore, to find that the first attempt to fix the relief is made in the charter which Henry I. issued at the beginning of his reign. He promised that the heirs of tenants in chief and the heirs of mesne tenants should not be compelled to buy back their lands, but should only be obliged to pay a just and lawful relief.[8] Glanvil[9]

[1] Glanvil, ix 4, and Bracton, f. 84b, talk as if the payment made by a socage tenant was a relief; Bracton, f. 85b, and Britton, ii 50, seem to confine the relief to grand serjeanty or knight's service—the payment made by the socage tenant Britton calls a recognition of seignory. In a case reported Y.B. 33-35 Ed. I. (R.S.) 350-355 it was argued that tenancy in fee farm (above 52) carried no relief—but the case went off on another point.

[2] Below n. 9; Excerpta e Rot. Fin. (R.C.) i 409 (28 Hy. III.).

[3] Britton ii 51.

[4] Above 46-47.

[5] Y.B. 11 Hy. IV. Trin. pl. 9 cited P. and M. i 270.

[6] § 154.

[7] P. and M. i 297 citing Burton Cart. 30.

[8] § 2, "Si quis baronum, comitum meorum sive aliorum qui de me tenent, mortuus fuerit, hæres suus non redimet terram suam sicut faciebat tempore fratris mei, sed justa et legitima relevatione relevabit eam. Similiter et homines baronum meorum justa et legitima relevatione relevabunt terras suas de dominis suis."

[9] ix 4, "Dicitur autem rationabile relevium alicujus, juxta consuetudinem regni de fœdo unius militis, centum solidi; de socagio vero quantum valet census illius socagii per unum annum; de baroniis vero nihil certum statutum est . . . idem est de serjanteriis;" some commentators think that these rates were not binding on the crown, so that all tenants in chief were liable to arbitrary reliefs, McKechnie, Magna Carta 197 n. 1; but see Round, Magna Carta Commemoration Essays 53-59; those

and the Dialogus de Scaccario[1] tell us that the relief of the knight's fee is fixed at 100s., but that the relief of baronies and serjeanties is not fixed. The charter of 1215 fixed the relief of the barony at £100, and that of the knight's fee at 100s.;[2] but at some period before the revision of the charter by Edward I. the £100 had been reduced to 100 marks.[3] Towards the end of the thirteenth century the payment made by the heir of the socage tenant—which, as we have seen, came to be called a relief—was finally fixed in the mode stated by Glanvil at one year's additional rent.[4] At some period before the beginning of the fifteenth century the relief of the tenant by serjeanty was fixed at one year's additional value of the land.[5]

It is one thing to fix the amount of the relief payable: it is another thing to secure a peaceable succession to the heir on payment of that relief. The lord's interest is to get payment, and he will naturally contend that he has the right to take possession of the land and exclude the heir till payment is made. The heir's interest is to enter upon his inheritance, and he will naturally contend that he has the right to take and keep possession of the land which is his, paying his relief. Both Glanvil and Bracton allow the lord to take a "simple seisin"—such a seisin as will not disturb the heir.[6] But obviously, till an heir appears, the lord has the right to take possession of what is his, if there is no heir.[7] It appears from the Petition of the Barons (1258) that the lords had gone beyond their rights. They had taken possession of and wasted the land, though an undoubted heir existed who was ready to pay his relief.[8] In 1267 the Statute of Marlborough settled the law in the sense in which it had been laid down by Bracton. It enacted that if there was a person clearly entitled

who paid reliefs to the crown were, till 1258, liable for a further sum called "Queen's Gold," payable to the queen, McKechnie, op. cit. 198.

[1] ii x (p. 135).

[2] c. 2; Mr. Round has shown that the line drawn in this chapter between baronies and knights' fees for the purposes of relief, has nothing to do with the line drawn in chapter fourteen between the greater barons and the other tenants in chief, Magna Carta Commemoration Essays 46-53; as he points out, ibid 77, "the line drawn in the second chapter was in practice sharply defined, because the relief payable to the crown could only be determined by it; the line drawn in the fourteenth was, on the contrary, vague, and remained in practice undefined."

[3] P. and M. i 289, "And thus the notion that a barony consists of 13⅓ knights' fees was engendered."

[4] Glanvil ix 4; Bracton f. 85b; P. and M. i 290 n. 1.

[5] Above 47 n. 1.

[6] Glanvil vii 9, ix 4; Bracton ff. 252, 252b. Glanvil's words (vii 9) are, "Hæredes vero majores statim post decessum antecessorum suorum possunt se tenere in hæreditate sua, licet domini possint fœdum suum cum hærede in manus suas capere; ita tamen moderate id fieri debet, ne aliquem disseisinam hæredibus faciant: possunt enim hæredes, si opus fuerit, violentiæ dominorum resistere, dum tamen parati sunt relevium et alia recta servitia eis inde facere."

[7] Glanvil ix 6.

[8] § 1 (Sel. Ch. 382),

as heir in possession, "the chief lord shall not put him out, nor take, nor remove anything there, but shall take only simple seisin, that he may be known as lord; and if the lord ousts the heir, the heir shall recover damages as in assize of novel disseisin." [1] It was only if no heir appeared, or if there was a dispute as to the inheritance, that the lord could take more than "simple seisin."

But in this branch of the law, as in many others, "the king was prerogative." On the death of the tenant in chief he was always and under all circumstances entitled to first seisin—*primer seisin*.[2] Being so seised he issued the writ *diem clausit extremum* [3] to the escheator, who held an *inquisitio post mortem*. When the heir had done homage and paid his relief, he might then, and not till then, sue the tenements from out of the king's hand (*ouster le main*) and get seisin. This right of the king was recognized by the Statute of Marlborough [4] and the Prærogativa Regis.[5]

Reliefs are in theory still payable. The royal right to primer seisin was abolished in 1660.[6]

(iii) Wardship and marriage.

We have seen that the interest of the tenant only gradually became hereditary, and that when it had become hereditary the obligation to pay a relief still reminded the heir of the lord's rights. It is clear that when the hereditary principle was still struggling for recognition the lord's claim to take back the land on the death of his tenant would be most strongly felt when the tenant's heir was an infant or a woman. The lord, it would be argued, must be allowed to educate the infant heir, so that he may become a worthy tenant, and he must have some say in the marriage of the woman, lest he be forced to accept as a tenant his personal enemy.[7] We have seen that these ideas were making themselves felt in England, as in other parts of Europe, in the Anglo-Saxon period.[8] After the Conquest new point was given to these rights of the lord by the rigid theory of tenure, by the centralized administration of the law, and by the power of the crown. The rights of wardship and marriage became definite rights of great pecuniary value both to the king and to the mesne lords.[9] To modern minds such rights seem to be very fiduciary

[1] 52 Henry III. c. 16; cp. Britton ii 52.
[2] Glanvil ix 6; Bracton f. 252b.
[3] For this writ see F.N.B. 252K; in its final form the writ is not known till the end of Henry III.'s reign; we have incidental uses of the phrase "diem clausit extremum" in the 27th and 29th years; but at first various forms of words were used, Excerpta e Rot. Fin. (R.C.) ix, x.
[4] 52 Henry III. c. 16. [5] c. 3; for this document see vol. i 473 n. 8.
[6] 12 Charles II. c. 24. [7] See Glanvil vii 12. [8] Vol. ii 75.
[9] See e.g. Bl. Comm. ii 76, 77; but as Maitland says (P. and M. i 304), "To speak of the English lords as groaning under the burdens of wardship and marriage is hardly permissible; we do not hear their groans."

in their nature. None of the incidents of tenure are more alien to our ideas, and none have been more execrated. That they were beginning to be repugnant to the current morality even of the thirteenth and fourteenth centuries there are some signs. In the French law of the thirteenth century the right of wardship is not simply a valuable right of the lord;[1] and in England, unlike the other incidents of tenure, they were always incidents of the military tenures only—they never became common to all the free tenures. We may well believe that these rights originally assumed the extremely commercial form which they took in England, because the land law in England was reduced to a set of definite rules at an early period; and that they retained this form, because they formed an increasingly valuable asset of the royal revenue. It should be remembered also that it is not only in England that early law regards as a right that which a more mature system of law regards as a duty. The *tutela* of Roman law supplies an analogy. All varieties of *tutelæ* were originally valuable rights. The *tutela impuberum* developed into an onerous trusteeship; but the *perpetua tutela mulierum* was incapable of this development. Just as it gradually became an anomaly and an anachronism because it could only represent the primitive idea, so these incidents of wardship and marriage were gradually felt to be more and more oppressive and finally disappeared. But in their case there could be no such gradual modification and gentle decay as we see in Roman law, because they were not only valuable rights, but valuable rights in which the king had come to be chiefly interested.

As was the case with the other incidents of tenure, so with wardship and marriage, their extent was at first vague. There can be no doubt that they were exploited to the utmost by William II.;[2] and, as in the case of the relief, Henry I. was obliged to promise some reform. If any of the king's tenants, he says, wishes to marry his female relative to any one he is to speak with the king; the king will not take anything for giving his licence, nor will he forbid the match, unless it is proposed to marry the lady to his enemy. A female heiress the king will marry after taking counsel with his barons. A widow shall not be compelled to marry against her will. If she has children their lands and persons shall be entrusted to the widow or to their

[1] Esmein, Histoire du Droit Français 236, "Dans la plupart des coutumes la garde seigneuriale fut, de bonne heure, remplacée par le *bail*, qui forme le droit commun au xiiie siecle. Il consista en ce que la jouissance du fief, au lieu de retourner au seigneur, pendant la minorité de l'héretier, resta à la famille de celui ci; un parent, en qualité de baillistre, eut la jouissance du fief, à charge d'en faire les services;" we see a similar development in the guardianship in socage, below 65-66; for guardianship in general see below 511-513.

[2] P. and M. i 306, 307.

nearer relatives. The barons shall observe the same law with respect to their tenants.[1] These promises were certainly not fulfilled. Probably both the king and the mesne lords were loath to abandon valuable rights. Glanvil[2] lays it down that until majority the lord has the custody of the sons and heirs of his military tenants, and also of their estates, "so as to have complete power of disposing of both." He has the marriage of his female wards and "can manage their affairs generally in the same way as he is accustomed to manage his own." He cannot, however, alienate the inheritance; he must properly maintain the heir; and, to the extent of the value of the inheritance, he must pay the deceased's debts; he must also restore the inheritance in good condition. Glanvil, therefore, recognizes both wardship and marriage as valuable rights belonging to the lord. It is true that he also recognizes that the lord has duties to perform; and that when he talks of the right of marriage he only mentions the marriage of female wards. These characteristics may be due to a growing feeling—perhaps derived from Roman law—that guardianship involved duties as well as rights, and to reminiscences of the original ground for the right of marriage which fitted in with these newer ideas. However that may be, Maitland has shown that these newer ideas ran counter to the practice of the time.[3] At the time when Glanvil was writing the wardships and marriages both of male and of female wards were regarded simply as valuable rights to be bought and sold; and it is clear from Magna Carta that the barons were not disposed to give them up. The charter asserted them in large terms. The guardian must not waste the lands of his ward; the ward must not be married to one of lower social rank. Subject to this the guardian has a free hand.[4] The Statute of Merton[5] (1235-1236) still further emphasized the lord's right by giving to the lord new remedies if his ward

[1] Henry I.'s Charter §§ 3 and 4, "Et si quis baronum vel aliorum hominum meorum filiam suam nuptum tradere voluerit sive sororem, sive neptim, sive cognatam mecum inde loquatur; sed neque ego aliquid de suo pro hac licentia accipiam neque defendam ei quin eam det, excepto si eam vellet jungere inimico meo. Et si mortuo barone sive alio homine meo filia hæres remanserit, illam dabo consilio baronum meorum cum terra sua. Et si mortuo viro uxor ejus remanserit et sine liberis fuerit, dotem suam et maritationem habebit, et eam non dabo marito nisi secundum velle suum.

"Si vero uxor cum liberis remanserit, dotem quidem et maritationem habebit, dum corpus suum legitime servaverit, et eam non dabo nisi secundum velle suum. Et terræ et liberorum custos erit sive uxor sive alius propinquiorum qui justius esse debebit. Et præcipio quod barones mei similiter se contineant erga filios vel filias vel uxores hominum suorum."

[2] vii 9, 12.

[3] P. and M. i 305, 306.

[4] cc. 4, 5, 6, 37; see McKechnie, Magna Carta 206-209; the provisions against waste were re-enacted by 3 Edward I. c. 21, and damages were in some cases given to the heir by 6 Edward I. c. 5.

[5] 20 Henry III. cc. 6 and 7.

were abducted; and by providing that, if the child married without licence, double the value of the marriage should be forfeited, and the land should be held by the lord till that sum was paid. The lord could not compel his ward to marry; but the same statute provided that if he declined the match his lord proposed he must pay its value, "quia maritagium ejus qui infra ætatem est mero jure pertinet ad dominum fœdi." The provisions of this statute were re-enacted and extended in 1275.[1] In particular it was enacted that if the lord, wishing to keep the land, did not marry his female ward at fourteen, he should keep the land till the ward was sixteen, and after that should lose his rights to wardship and marriage.[2] Wardship and marriage, therefore, were valuable proprietary rights. They were chattels which could be sold, which could be bequeathed, which would pass to the guardian's executors or administrators.[3] In two respects only did this final settlement of the law curtail the rights of the lords. (1) Apparently they lost the right, which perhaps they once had, to control the marriage either of a female tenant of full age or of the daughter of a military tenant.[4] It was only the king who ultimately retained something of these rights in his power to control the marriage of widows who held of him in chief.[5] (2) The heir who had been in wardship need pay no relief;[6] but in spite of this the king still retained his right to half a year's profits of the land as a fine for suing out livery—i.e. obtaining the livery of seisin of the lands from the king.[7]

We have seen that one man may hold of many different lords. If he died, leaving an infant heir, who was entitled to the wardship and marriage? If the king was one of these lords there was no question. He was entitled to the wardship both of all the lands, of whomsoever they were held, and of the person of the heir, and to his marriage, to the exclusion of all others.[8] A clause of Magna Carta was needed to prevent the king from exercising his right when the land held of the king by the tenant was socage, fee farm, burgage, or petit serjeanty, and when the king held

[1] 3 Edward I. st. 1 c. 22; Y.B. 18, 19 Ed. III. (R.S.) 370, 372.

[2] See Litt. § 103; and for a discussion of these statutes cp. Y.B. 35 Hy. VI. Hil. pl. 17.

[3] P. and M. i 303; cp. Y.B. 30, 31 Ed. I. (R.S.) 312; for grants of wardship see Madox, Form. nos. 519, 573-575; Eynsham Cart. i no. 572; App. VI.

[4] Glanvil vii c. 12.

[5] Magna Carta c. 8 reserved this right to the king and other lords; but it came to be important only in the case of the king; for instances see Excerpta e Rot. Fin. (R.C.) i 7, 204; the latter entry runs, "Stephanus de Sedgrave finem fecit cum rege centum libris pro habendo maritagio Emmæ de Canz quæ fuit uxor Johannis de Sedgrave ad maritandum eam cui ipse et hæredes vel assignati sui voluerit absque disparagatione;" cp. Y.B. 20 Ed. III. (R.S.) i 544, 546.

[6] Magna Carta c. 3.

[7] Bl. Comm. ii 76.

[8] Bracton f. 87.

merely *ut de honore* and not *ut de corona*.[1] If the king was not one of these lords each lord got the wardship of the land held of him. It was ultimately settled in 1285 that the wardship of the heir's body and the right to his marriage were given to the lord of whom the heir held by the oldest feoffment.[2] But these rules as to mesne lords, which were often complicated, tended to fall into disuse, partly because of the extent of the king's right of prerogative wardship, partly because of the effect of Quia Emptores.[3] When the court of Wards and Liveries was established in the sixteenth century, the rights to wardship and marriage were almost exclusively the king's rights, and he alone was compensated when these rights were abolished.[4]

These rights of wardship and marriage were confined to the tenures by knight service and grand serjeanty. They were never extended to socage and petty serjeanty.[5] The rule as to wardship which ultimately prevailed in the case of such tenants is that stated by Glanvil.[6] "The heirs of socage tenants shall on the death of their ancestor be under the guardianship of their nearest relations, provided, however, that if the inheritance has descended from the father's side the wardship belongs to the relations on the mother's side, but if the inheritance has descended from the mother's side, then it belongs to the relations of the father. For the wardship is never by law placed in the hands of any one of whom any suspicion can be entertained that he may or will claim any right to the inheritance." At first the wardship of socage tenants, no less than the wardship of military tenants, was regarded as a valuable right, to be bought and sold.[7] But in the thirteenth century the idea that wardship imposed duties was growing. The Statute of Marlborough (1267) enacted that the heir, when he attained majority, should have an action of account against his guardian, and that the guardian should not give or sell the marriage of the heir "but to the advantage of the foresaid

[1] cc. 37 and 43; above 41 n. 2.

[2] Bracton ff. 87, 89-91b; 13 Edward I. st. 1 c. 16; Y.BB. 21, 22 Ed. I. (R.S.) 10; 6 Ed. II. (S.S.) 180; 6, 7 Ed. II. (S.S.) 149 seqq.; in Y.B. 1, 2 Ed. II. (S.S.) 60 it is said by *Herle* that before the statute "he who can snap up the body of the heir shall have the wardship, and the other shall have no recovery;" for a case where this procedure had apparently been followed see 6 Ed. II. (S.S.) 31.

[3] The disregard of the interests of mesne lords is illustrated by the ruling in Sir Drew Drury's Case (1608) 6 Co. Rep. at f. 74b, that if the king makes the heir a knight in the life of his father he is out of wardship, though he is under age; see also Sir Henry Constable's Case (1601) 8 Co. Rep. 173a.

[4] 12 Charles II. c. 24.

[5] Y.BB. 20, 21 Ed. I. (R.S.) 240; 21, 22 Ed. I. (R.S.) 180; Bracton, f. 85b, says that they were extended to socage in the bishopric of Winchester—of this Bracton disapproved; for other similar instances cp. P. and M. i 301, 302.

[6] vii c. 11; cp. Litt. §§ 123, 124.

[7] Bracton f. 89, cited P. and M. i 303 n. 4.

heir."[1] Thus guardianship in socage developed into a trusteeship.[2] It became the model to which all forms of guardianship ultimately conformed,[3] just as socage tenure itself became the tenure in which all the other free tenures were merged.

(iv) Aids.

In the days when the feudal group was a little state associated for mutual help and protection the lord might call upon the tenant to assist him in emergencies.[4] In early days these emergencies were not strictly defined. It was only possible to give leading instances, such as the knighting of an eldest son or the marriage of an eldest daughter. Glanvil declines to give an exhaustive list, and says nothing as to their amount except that they must be proportionate to the value of the fee.[5] The charter of 1215 lays it down that, except with the consent of the commune concilium, they may only be taken on three occasions—to ransom the lord's person, to make his eldest son a knight, and to marry his eldest daughter.[6] This clause did not appear in later editions of the charter, and, in fact, aids were taken by lords for many other purposes—e.g. to enable a lord to pay his debts, or even to stock his land.[7] Bracton speaks as if the grant of aid was always a favour granted by the tenant to help his lord out of difficulties and never demandable as of right.[8] But, as Maitland points out, though there may be historical truth in this theory, it was becoming obsolete.[9] A contribution which will be sued for in the king's courts if it is refused cannot be said to depend altogether on the favour of the tenant.[10] In England, as in France, the tendency was to fix the amount of the aid and the occasions on

[1] 52 Henry III. c. 17; at that time the writ of Account was a new writ, P. and M. i 303 n. 6.

[2] Litt. § 125, "The guardian in chivalry hath the wardship to his own use, and the guardian in socage hath not the wardship to his own use, but to the use of the heir;" cp. Plowden 293; but the guardian could do certain acts in his own name, e.g. grant copyholds, Shopland v Ryoler (1606) Cro. Jac. 98.

[3] 12 Charles II. c. 24 § 9.

[4] As Blackstone says (Comm. ii 63), "Aids were originally mere benevolences granted by the tenant to his lord in times of difficulty and distress."

[5] ix c. 8, "Postquam vero convenerit inter dominum et hæredem tenentis sui de rationabili relevio dando et recipiendo, poterit idem hæres rationabilia relevia de hominibus suis inde exigere, ita tamen moderate secundum quantitatem fœdorum suorum et secundum facultates, ne nimis gravari inde videantur, vel suum contenementum amittere. Nihil autem certum statutum est de hujusmodi auxiliis dandis vel exigendis, nisi ut prædicta forma inviolabiliter observetur."

[6] c. 12.

[7] See instances cited P. and M. i 331.

[8] f. 36b, "Nunquam igitur exigitur auxilium, nisi præcedat necessitas, nec tenetur aliquis ad hujusmodi auxilium præstandum, nisi ex indigentia domini sui capitalis, et ex eo quod est liber homo suus."

[9] P. and M. i 331.

[10] Y.B. 6, 7 Ed. II. (S.S.) 237; cp. Y.B. 33-35 Ed. I. (R.S.) 134, where in an avowry it is stated that "when the vill of B is assessed at 20s. at each creation of a bishop [clearly a form of aid] the lady shall pay 16½d., and when at more, more, etc."

which it could be demanded, and thus to create a legal obligation to pay it.[1] In 1275 the rate of the aid for knighting the lord's eldest son and for marrying the lord's eldest daughter was fixed,[2] and in 1350[3] the rates so fixed were made binding upon the crown. These statutes seem, in effect, to have fixed not only the amount of the aid, but also the occasions on which it could be demanded. Aids as so fixed were abolished in 1660.[4] But it is interesting to note that as early as 1503 the commons had imposed a tax on all lands—freehold, copyhold, or ancient demesne—part of the consideration for which was the release of the king's rights to the two aids then due for the marriage of his eldest daughter and the knighting of his eldest son. The reason assigned for taking this course was that "if the same Aides shuld be of them levyed and had by reason of their tenures, accordyng to the Auncient Lawes of this Land, shuld be to theym doubtefull, uncerteyn and great inquietness, for the serche and non knowledge of their severall Tenures, and of their Landes chargeable to the same"[5]—a reason which makes it clear that the older theory underlying these payments had by that time completely disappeared. The plan then adopted of commuting them for a Parliamentary grant foreshadows the course which a century and a half later will be adopted with respect to all these incidents of tenure.

(v) Escheat and forfeiture.

All land is held of some lord. That lord or some one of his predecessors in title is supposed to have given the land to the tenant or some one of his predecessors in title. Therefore, if the tenant die without heirs it is only right that the lord should have back again that which he gave to the tenant. This is escheat *propter defectum sanguinis*. Similarly, if the tenant commits any gross breach of the feudal bond—commits, that is, a "felony" in the original sense of that term[6]—the lord may take again that which he gave. This is escheat *propter delictum tenentis*.

The right of escheat was thus a tenurial right wholly dependent upon the fact that the freehold had no tenant. Therefore it could only arise when a tenant in fee simple died without heirs or committed felony. If the estate was a life estate it obviously disappeared when the tenant died; and if the tenant committed felony, the reversioner or the remainder man became

[1] In France we find the same three aids as are fixed by Magna Carta, with a fourth to assist the lord who is going on crusade, Esmein, Histoire du Droit Français 220.

[2] 3 Edward I. st. 1 c. 36.

[3] 25 Edward III. st. 5 c. 11.

[4] 12 Charles II. c. 24.

[5] R.P. vi 532 (19 Hy. VII. no. 11).

[6] Vol. ii 357-358.

entitled. Similarly, if the estate was an estate tail, the reversioner or remainder man could bring his formedon and recover the land if the tenant died without issue or committed felony before the birth of issue.[1] But, in these cases, it was the operation of the Statutes de Donis[2] and Quia Emptores[3] which clearly differentiated this right of the reversioner or remainder man to succeed on the expiration of a particular estate, from the tenurial right of the lord to take the fee simple by escheat. Before the passing of De Donis there were no estates tail. Gifts which, after De Donis, gave an estate tail, then gave an estate in fee simple conditional.[4] Before the passing of Quia Emptores estates in fee simple, as well as other estates, were held of the donor. It followed that if the donee of an estate in fee simple died without an heir, or if the donee of an estate in fee simple conditional died without having had an heir of his body, the lord took the estate. Whether he took it as a reversion or as an escheat it was neither possible nor necessary to say. Thus it is not surprising to find that at this period the words "revert" and "escheat" are used indiscriminately; for it was not till the passing of these two statutes that it was possible to draw the modern distinction between them.[5] It is not till then, therefore, that the incidents of the modern estate in reversion were clearly ascertained.[6]

The history of the two varieties of escheat—escheat *propter defectum sanguinis* and escheat *propter delictum tenentis*—has been dissimilar.

Escheat *propter defectum sanguinis* is still part of the law. But in practice, owing to the operation of the statute Quia Emptores[7] in destroying mesne tenure or the evidence of its existence, it gradually came to be a right more valuable to the crown than to any one else; and even to the crown it came to be of little value when all free tenants acquired the right to devise freely their estates.[8]

The change in the conception of felony which made it mean,

[1] F.N.B. 144A.
[2] 13 Edward I. st. 1 c. 1.
[3] 18 Edward I. c. 1.
[4] Below 111-114.
[5] See Willion v. Berkeley (1562) Plowden at pp. 247-248 *per* Anthony Browne, J.; P. and M. ii 22-23; H.L.R. iii 170, where it is pointed out that, in a MS. Register of Henry III.'s reign, a writ, which answers the purpose of a writ of formedon in the reverter, is called a writ of escheat.
[6] Below 133.
[7] Vol. ii 348; below 81.
[8] Glanvil vii 17 thus expresses the rule, "Ultimi heredes aliquorum sunt eorum domini. Cum quis ergo sine certo hærede moritur, quemadmodum sine filio, vel filia, vel sine tali hærede de quo dubium non sit ipsum esse propinquiorem hæredem et rectum, possunt et solent domini fœdorum feoda illa tanquam escaetas in manus suas capere et retinere; quicunque sint domini, sive rex, sive alius;" to the same effect Britton ii 326, "the lord shall stand in place of the heir;" Glanvil and Britton do not mean necessarily that the lord's position was in all respects the same as that of the heir, cp. Bracton f. 297b; they are using a figurative expression to describe the title of the lord who takes by escheat.

not the breach of the feudal bond, but serious crime, was no doubt at first profitable to the lord. He obtained an escheat *propter delictum tenentis* whenever his tenant had committed one of a growing number of felonies.[1] No doubt, too, this change in the meaning of the term "felony" caused escheat to the lord for this reason to be somewhat destitute of meaning. If a felony is a crime against the state, and if it is desirable to confiscate the property of criminals, one would think that the state should benefit. But this would have been too serious a departure from feudal conceptions to be insisted on. The establishment of an effective criminal law was difficult enough. It would have been well-nigh impossible if it had diminished the proprietary as well as the jurisdictional rights of the landowner. At all events, whatever may have been the wishes of the crown, the will of the great landowners was clearly and decisively expressed in the clause of Magna Carta in which the crown renounced any claim to forfeiture on the ground of felony.[2] In the thirteenth century, then, a conviction for felony entailed the escheat of the lands of the felon to the lord; and the conviction related back to the moment of the commission of the crime, so that all intervening dealings with the property were avoided.[3] As the newer conception of felony prevailed it was supposed to have this effect because the felon's blood was attainted or corrupted. He could not own any property himself, nor could any heir born before or after the felony claim through him.[4] The same consequences followed upon an abjuration of the realm,[5] and upon a judgment of outlawry upon an indictment for felony.[6]

In all such cases of escheat the lord's right was subject to the right of the crown to "year, day, and waste." This is an old right—it appears in Glanvil[7]—but its origin is obscure. The *wite* of Anglo-Saxon law shows us that the king was regarded as having some interest in the enforcement of criminal justice.[8] This

[1] P. and M. i 285.

[2] (1215) § 32, "Nos non tenebimus terras illorum qui convicti fuerint de felonia, nisi per unum annum et unum diem, et tunc reddantur terræ dominis fœdorum."

[3] Bracton ff 30b, 130a; at f. 30b he cites for the rule Dig. 39, 5, 15; P. and M. i 460; but in the case of conviction on an *appeal* of felony there was no relation back, Co. Litt. 13a, b, 390b.

[4] "Et sicut non valet donatio post feloniam perpetratam, ita nec valebit generatio quoad successionem, quantum ad hereditatem paternam et maternam, cum sit progenita talis ex testiculo et sanguine felonis," Bracton f. 130a; Y.B. 20, 21 Ed. I. (R.S.) 352; Co. Litt. 8a.

[5] P. and M. ii 588, 589; Coke, Third Instit. 217; below 303-304.

[6] Bracton f. 130a; Coke, Third Instit. 212; below 604-605.

[7] vii c. 17, "Terra quoque per unum annum remanebit in manu domini regis, elapso autem anno, terra eadem ad rectum dominum, scilicet ad ipsum de cujus fœdo est, revertetur, verumtamen cum domorum subversione et arborum extirpatione;" if a lord disregarded the right of the crown the land was seized, and the lord was made liable for mesne profits, the Eyre of Kent (S.S.) i 58-59; in later law the right to waste was always in practice compounded for by the lord, Challis, Real Property 35.

[8] Vol. ii 47.

right of the crown may be a new way of expressing that interest. Continental analogies, however, would lead us to suppose that the property was regarded as in some way under the king's ban—perhaps because it was regarded, like the deodand, as tainted with guilt.[1]

This cause for escheat has almost disappeared from the law. The doctrine of abjuration, with the right of sanctuary to which it was appendant, was abolished in 1624.[2] The doctrine of corruption of blood, as far as it prevented any descent from being traced through the convicted felon, was abolished by the Inheritance Act in 1834[3] and, after being modified in other ways by several statutes,[4] the whole law of escheat for felony, together with the king's right to year, day, and waste, was abolished in 1870.[5] All that remains of escheat *propter delictum tenentis* is escheat as a consequence of outlawry upon an indictment for felony.

The right of forfeiture in no way depends upon tenure. It was the prerogative right of the king as king to all the lands of a person convicted of high treason.[6] Land thus forfeited was, if granted out by the crown, held *ut de corona*, unlike land escheated for felony which, if granted out again, was held *ut de honore*.[7] But forfeiture resembled escheat *propter delictum tenentis* in that the crown's right related back on conviction to the time when the offence was committed.[8] It can be traced as far back as John's reign. Probably at that time the crown was attempting to enforce a right to the land of all felons. But, as we have seen, Magna Carta distinctly stated that the crown had no such right in the case of ordinary felony.[9] In the case of high treason the crown had a stronger claim to override the claim of the feudal lord. Treason is an offence against the king and the state. It is a breach of the bond of allegiance, whereas felony had once been a breach of the feudal bond of homage; and no doubt it seemed

[1] Maitland, Coll. Papers ii 61, Possession for a year and a day, where the various effects which possession for this period might have in different circumstances are collected. We may perhaps see in this right to year, day, and waste some reminiscence of the *missio in bannum regis* of the Frankish kings—the administrative sequestration of the property of a contumacious defendant, Borough Customs (S.S.) ii xvii, xviii, 1.

[2] 21 James I. c. 28 § 7; for abjuration and sanctuary see below 303-307.

[3] 3, 4 William IV. c. 106 § 10.

[4] 54 George III. c. 14; 9 George IV. c. 31 § 2; 24, 25 Victoria c. 100 § 8.

[5] 33, 34 Victoria c. 23 § 1—the king's right to year, day, and waste does not seem to be specifically noted.

[6] P. and M. i 332.

[7] Hale, P.C., i 253-254; for this distinction see above 41 n. 2.

[8] Challis, Real Property 36, citing Pimb's Case (1585) Moore 196; in the case of estates tail the effect of De Donis was to limit the forfeiture to the life interest of the traitor; but 26 Hy. VIII. c. 13 § 5 extended the right of the crown to the time during which issue existed who might have inherited.

[9] Above 69.

like robbery to take lands from the feudal lord for offences called by a name which was still used to signify an offence against the relationship of lord and man. The crown made good its claim in cases of high treason. The lands of a convicted traitor were forfeited to the crown, of whatsoever lord they were held, and the lord thereby lost all claims to an escheat. As we have seen, it was largely this conflict of interest between king and lord which led to the definition of high treason in Edward III.'s reign.[1] Forfeiture upon conviction for treason was abolished in 1870 by the same statute which abolished escheat for felony.[2] It still exists as a consequence of outlawry upon an indictment for treason.[3]

The rise of the Use in the Middle Ages,[4] and the subsequent growth of equitable trusts in the sixteenth and seventeenth centuries,[5] naturally raised the problem of the relation of the lord's right of escheat, and of the king's right of forfeiture to these new interests in the land.

In the Middle Ages this problem was settled upon clear and logical principles. These rights attached only to the legal estate. Therefore the estate of the cestuique use was unaffected by them, just as it was unaffected by any of the other incidents of tenure. On the other hand, the estate of the feoffee to uses was subject to them, so that if a sole feoffee died without heirs, or committed felony or treason, the lord or the king could claim the land as an escheat or a forfeiture;[6] and as the lord or the king was in "in the post,"[7] i.e. was in by title paramount, they were not bound by the trust.[8] We shall see that it was a principal object of the Statute of Uses to restore to the crown the revenue arising from the right of forfeiture and from escheat and the other incidents of tenure; and that it succeeded in restoring this revenue, because, when it applied, it transferred the legal estate of the feoffees to uses to the cestuique use.[9] In later law the liabilities of the new equitable estates arising after the Statute of Uses to the rights of escheat and forfeiture respectively diverged, and therefore they must be considered separately.

(*a*) In the case of escheat the law formerly applicable to the use was followed. If the cestuique use died without heirs and intestate or committed felony, there was no escheat. The trustee

[1] Vol. ii 449-450, 475-476.
[2] 33, 34 Victoria c. 23 § 1.
[3] L.Q.R. xviii 297, Outlawry, Is it Obsolete?
[4] Bk. iv. Pt. I. c. 2.
[5] Ibid, and cc. 4 and 8.
[6] Bk. iv. Pt. I. c. 2.
[7] This expression, which is always used to denote that the person's title is not derived from the former holder, but is paramount to it, is obviously derived from the use of the same expression in connection with the writs of entry, above 13.
[8] Bk. iv. Pt. I. c. 2.
[9] Ibid.

held for his own use.[1] Lord Mansfield, it is true, dissented from this view of the law, and contended that in such a case there was an escheat to the crown.[2] This view always had its supporters;[3] but it was not till 1884 that the legislature adopted it in respect to the only important case of escheat which had survived—escheat *propter defectum sanguinis*.[4] On the other hand, if a sole trustee died without heirs and intestate or committed felony there was an escheat and the crown or other lord was not bound by the trust.[5] Statutes of the nineteenth century were passed to obviate the hardships resulting from this state of the law.[6] At the present day escheat for felony has been abolished, and the Conveyancing Act, 1881,[7] provides that such estates shall devolve upon the trustee's personal representatives notwithstanding any testamentary disposition; and the Trustee Act, 1893,[8] gives the court power to vest the trust estate in the person entitled thereto.

(*b*) In the case of forfeiture for treason statutes of Henry VIII.'s and Edward VI.'s reigns provided that the crown should acquire the estates held to the use of a person who had committed high treason;[9] and these statutes were, after a little hesitation, held to apply to equitable trusts.[10] In other cases in which the crown was entitled to land by virtue of its prerogative, whether, as in the case of chattel interests, because the property was *bona vacantia*,[11] or, as under the older law, because land was held by or on trust for an alien,[12] it was entitled to both legal and equitable interests. Treason committed by a sole trustee originally meant the forfeiture of the estate; but the law on this point was changed by the same series of statutes as applied to escheat for felony.[13]

[1] Attorney-General v. Sands (1668) Hardres 488; Hale, P.C. i 249; Burgess v. Wheate (1757-1759) 1 Eden 177; a good account of the last-named case will be found in an article on the Law of Escheat by F. W. Hardman, L.Q.R. iv 330-332.

[2] 1 Eden at pp. 215-239.

[3] L.Q.R. iv. 333-335.

[4] 47, 48 Victoria c. 71 § 4.

[5] Peachy v. Duke of Somerset (1722) 1 Stra. at p. 454; Burgess v. Wheate 1 Eden at p. 203; Attorney-General v. Duke of Leeds (1833) 2 My. and K. 343; Sanders, Uses (5th ed.) 305; exactly the same principle applied when a mortgagee died without heirs and intestate; the lord took free from the mortgagor's equity of redemption; see L.Q.R. iv 329-330.

[6] 39, 40 George III. c. 88 § 12; 59 George III. c. 94; 11 George IV. and 1 William IV. c. 60; 4, 5 William IV. c. 23 § 2; 1, 2 Victoria c. 69; 13, 14 Victoria c. 60.

[7] 44, 45 Victoria c. 41 § 3.

[8] 56, 57 Victoria c. 53 §§ 26, 29.

[9] 33 Henry VIII. c. 20; 5, 6 Edward VI. c. 11; Hale, P.C. i 240-244.

[10] Ibid i 248-249.

[11] Middleton v. Spicer (1783) 1 Bro. C.C. 201; cp. note to Burgess v. Wheate, 1 Eden at pp. 259-260.

[12] Attorney-General v. Sands (1668) Hardres at p. 495 *per* Hale, C.B.; cp. Sanders, op. cit. 308-311; L.Q.R. iv 324.

[13] Above n. 6; Sanders, op. cit. 305.

The history of these incidents and consequences of tenure bears witness to the same tendencies as those which have been noted in the history of the free tenures themselves. Incidents like homage, primer seisin, wardship, marriage and aids being inconsistent with the new conception of landowning as a form of property merely, became rapidly meaningless, and only survived because they conferred valuable rights upon the crown. Forfeiture and escheat *propter delictum tenentis* survived longer on grounds of public policy. On the other hand, incidents like fealty, relief, and escheat *propter defectum sanguinis* still survive, partly because their abolition might have disturbed the rights of private persons, but chiefly because it would have been difficult to destroy them without rooting up the whole conception of tenure. Though the different tenures and all their incidents lasted on till 1660, it cannot be doubted that most of them had existed as burdensome anomalies for at least three centuries. The land law had become property law pure and simple by the beginning of the fourteenth century. The public elements once contained in it, to which the different tenures and their incidents bore witness, had evaporated. This fact will be more clearly brought out in the following section, in which I shall trace the process by which at an early date all free tenants had gained almost complete freedom of alienation.

§ 4. The Power of Alienation

The power to alienate land freely was in the twelfth century affected by two sets of causes. In the first place, there were certain restrictions imposed in the interest of expectant heirs. In the second place, there were certain restrictions imposed in the interest of the maintenance of the rights and duties involved in the relation of lord and tenant.

Restrictions Imposed in the Interest of Expectant Heirs

We have seen that in the Anglo-Saxon period it was only over his bookland that a man had free powers of disposition. Over the land held by folk right his powers were more limited.[1] In the future the rules as to bookland, so far as concerns transactions inter vivos, were to be the rules of the common law. But this was not clearly settled when Glanvil wrote. In his book we can still see the traces of the old rules; and what he tells us upon these matters is confirmed by the conveyances of this period. The consent of the heir is obtained; and it is

[1] Vol. ii 68.

sometimes thought worth while to pay a price to obtain it.[1] Glanvil tells us that we must draw distinctions between land acquired by purchase and that acquired by inheritance[2] and between the different purposes for which the alienation is made. A man may freely give a marriage portion to his daughter, or indeed to any other woman, or gifts to those who have served him, or gifts to the church.[3] He cannot, as a rule, make gifts when he is dying, because of such gifts there can be no livery of seisin.[4] As we shall see, such livery of seisin is beginning to be regarded by the king's court as the first essential of a valid conveyance.[5] But even these gifts may stand if the heir does not object.[6] On the other hand, a man must not so alienate as to deprive his heir, or his heirs, if the land is partible, of his or their reasonable portions; and though he has, as a rule, more power over acquired than inherited land, he cannot alienate even the acquired land if this is needed to secure these reasonable portions to the heirs.[7] Gifts to one child which will deprive the others of their due share are especially prohibited.[8] The severity of this prohibition may well be due to the antiquity of the rules. At an early period, when there was no trade in land, it would be favouritism as between the children rather than alienation to strangers which would chiefly call for express prohibition. But, seeing that gifts to daughters on their marriage or to retainers or to the church were allowed, it was easier to make such gifts as these than to make gifts to a child which might diminish the shares of

[1] P. and M. ii 307-309 and references there cited; cp. Madox, Form. nos. 426, 427.

[2] Glanvil vii 1, "Aut habet hereditatem tantum aut questum tantum;" "Sin autem et hereditatem et questum habuerit, tunc indistincte verum est quod poterit de questu suo quantumlibet partem sive totum cuicunque voluerit dare;" Somner, Gavelkind 40, and Charter of 1204, cited P. and M. ii 307, n. 3.

[3] "Potest itaque quilibet liber homo terram habens quandam partem terræ suæ cum filia sua, vel cum aliqua alia qualibet muliere, dare in maritagium sive habuerit heredem sive non, velit heres vel non, imo et eo contradicente vel reclamante. Quilibet etiam cuicunque voluerit potest dare quandam partem sui liberi tenementi, in remunerationem servitii sui, vel loco religioso in elemosina."

[4] "Si vero donationem talem nulla sequuta fuerit seisina, nihil post mortem donatoris ex tali donatione contra voluntatem heredis efficaciter peti potest."

[5] Below 221-222, 224; vol. ii 352-353.

[6] "Tamen hujusmodi donatio in ultima voluntate alicui facta ita tenere si cum consensu heredis fieret, et ex suo consensu confirmaretur."

[7] "Si vero questum tantum habuerit . . . non totum questum non potest filium suum heredem exheredare."

[8] "Si autem plures habuerit filios mulieratos non poterit de facili preter consensum heredis sui filio suo postnato de hereditate sua quantam libet partem donare. Quia si hoc esset permissum accideret inde frequens prius natorum filiorum exheredatio, propter majorem patrum affectionem quam sæpe erga post natos filios suos habere solent;" cp. Britton ii 245, when the ancestor has agreed to give his wife dower he cannot increase it to the heir's prejudice—this may be a survival.

the other children; and this anomaly became the more striking as the rule of primogeniture was extended from lands held by military tenure to lands held by the other kinds of free tenure. The eldest son was the heir. Without his consent nothing could be given to the younger sons, whereas something could be given to a stranger—in fact, the position of a bastard was preferable to that of a legitimate child.[1] The rule thus reduced to an absurdity had disappeared from English law by the time of Bracton.[2] As Maitland puts it, "Free alienation without the heir's consent comes in the wake of primogeniture."[3] The word "heirs" in a deed of gift comes to be merely a word of limitation and not a word of purchase—it marks the extent of the gift and gives nothing to the heirs. The common law from the thirteenth century onwards knows no *retrait lignagner*.

The heir was in some degree compensated by the prohibition of the devise of land. The question whether or no these devises should be allowed was an open question when Bracton wrote; and his opinion as to their validity fluctuated.[4] As Maitland points out, we can find at least one case in the latter half of the thirteenth century in which a large estate passed under such a devise;[5] and, in books of precedents, forms for these devises are given.[6] Probably the decision to prohibit them was caused chiefly by the fact that to permit them would lower the value of the incidents of tenure, and enormously diminish the lord's chance of an escheat. Partly, perhaps, it may have been felt that something was due to the heir; partly that to allow land to pass by will would have created a large exception to the rule that land cannot pass without a genuine

[1] "Sed nunquid filio suo bastardo potest quis filium et heredem habens de hereditate sua donare? Quod si verum est tunc melioris conditionis est in hoc bastardus filius quam mulieratus postnatus—quod tamen verum est."

[2] Bracton's Note Book case 1054, "Et Radulphus [the plaintiff] venit et cognoscit cartam patris sui [i.e. the charter conveying the land] . . . sed petit judicium si pater suus potuit dare totam terram quam tenuit per servicium militare nullo retento servicio sibi vel heredibus suis"—judgment is given for the defendant, "quia Radulphus cognoscit cartam patris sui."

[3] P. and M. ii 307.

[4] ff. 18b, 19 he thinks that "though this is unheard of," a writ might well be formed to meet the case; but ff. 49, 60b, 412b are opposed to this; cp. also Glanvil vii 1 and 5.

[5] P. and M. ii 27—in 1262 Henry III. allowed Peter of Savoy to bequeath the honour of Richmond; when he died the honour passed under his will; "it is possible that the discussion of this famous case convinced the king and the great feudatories that they would lose a great many wardships and marriages if land became devisable *per formam doni*."

[6] L.Q.R. vii 67, 68 Maitland says, "I am persuaded by Bracton's vacillating language, by a precedent that I have found in another collection, and by several actual deeds that I have seen, that this attempt very nearly succeeded, that the power of devise given by the statutes of Henry VIII. and Charles II. was very nearly won in the middle of the thirteenth century."

livery of seisin.[1] However that may be, from the end of the thirteenth century the law was settled. The ancestor could alienate as he pleased in his lifetime. He could not prevent the heir from inheriting what he had left at his death.

The Feudal Restrictions imposed in the Interests of the Maintenance of the Rights and Duties involved in the Relation of Lord and Tenant

The history of the free tenures has shown us that, to a greater or a less degree, landowning in the eleventh and twelfth centuries was a matter of public law. We at the present day would consider it anomalous if we were told that offices which involved the performance of public duties were freely alienable. As we have seen, such offices were often alienable in the past.[2] The proprietary element in feudalism was so strongly developed in this country that it was sometimes improperly extended to things which should never have been regarded as property at all. Probably something of the modern feeling against the alienability of public offices was in the twelfth and thirteenth centuries directed against the free alienation of land; and probably that feeling was stronger in the higher ranks of the feudal hierarchy than in the lower. Such dignified persons as earls, barons, or tenants by grand serjeanty were expected to fill very public positions and to perform very onerous duties. We shall see that restrictions upon the power of free alienation lasted longer in the case of the tenants in chief than in the case of other tenants.[3]

It is possible that the very generality of this feeling that free alienation was "contrary to public policy" prevented any very definite statement of it as a principle. There is no mention of it in Glanvil, though he mentions, as we have seen, the analogous subject of the restriction upon free alienation in the interest of the heir.[4] But there is, as Maitland has shown, plenty of evidence from charters of conveyance that the lord's consent to a gift by a tenant was thought desirable;[5] and there is a little evidence

[1] Vol. ii 352-353; P. and M. ii 326, 327.
[2] Vol. i 19, 250-251, 259-260, 425, 439, App. XXX.
[3] Below 83-84. [4] Above 73-74.
[5] P. and M. i 321-327 and authorities there cited; Madox, Form. nos. 71, 73, 74, 77, 83, 98, 676; below 228; at p. 324 Maitland says, "It is quite impossible for us to hold that the restriction expressed in the charter of 1217 was a new thing, or that the free alienability of the fee simple is the starting-point of English law; we must be content with a laxer principle, with some such idea as this, that the tenant may lawfully do anything that does not seriously damage the interests of his lord. He may make reasonable gifts, but not unreasonable. The reasonableness of the gift would perhaps be a matter for the lord's court; the tenant would be entitled to the judgment of his peers;" cp. Wright, Tenures 154-157, and Gilbert, Tenures 51, 52, who affirm that the licence of the lord was needed for alienation, with Coke,

that lords sometimes consulted their tenants before they made a conveyance of their own land.[1] As we shall see, one aspect of the law as to the necessity for the tenant's attornment on the alienation of a seignory was based upon the wrong done to a tenant if his lord, by alienating his seignory, substituted for himself a personal enemy of the tenant, or one incapable of fulfilling the duties of a lord.[2] Though, therefore, we get in Glanvil no definite statement as to restraints upon alienation based on the feudal principle, such as we get in the law of France of the same period, and even later,[3] we should probably not be far wrong if we concluded that such principles were generally recognized in England—so generally recognized that there was little need to make definite statements about them.

In the thirteenth century both in France and England landowning was tending to become more and more exclusively a branch of the law of property. Just as ideas drawn from Roman law helped to build up the conception of the state, so they helped to define and strengthen the legal conception of ownership. The owner of land is an owner of property; he has the *dominium*, though it is land of which he is *dominus*. Thus we find that both in England and in France these old restraints on the freedom of alienation tend to disappear. The process and the final result are different; but the general tendency is the same. We can see that in England this general tendency was welcomed and strongly promoted by the judges of the royal courts. In fact, they sympathized with it on two separate grounds—on technical grounds because it gave to the owner a power which, according to Roman law, all owners ought to have,[4] on grounds of public policy because it reduced landowning to mere property law, and thereby broke up the solidarity of the feudal group.[5] But the old ideas, though never expressed in definite rules, died hard,

Second Inst. 65, who thought that as a rule the tenant could alienate; probably all these earlier authorities are inclined to give too sharp an edge to vague customary rules; Esmein, Histoire du Droit Français 238-240, comes to a conclusion somewhat similar to that of Maitland; but in France the original restrictions on alienation were more definitely expressed than in England, and the freedom ultimately acquired less complete.

[1] P. and M. i 327; cp. Esmein, op. cit. 240; ibid n. 3 he notes that several lords in Languedoc in 1360 refused to comply with the treaty of Bretigny on this ground.

[2] Below 82.

[3] Esmein, op. cit. 238, citing *Libri Feudorum* i 13, ii 9, 34, 39, 40, *Grand Coutumier de Normandie* (thirteenth century), and *L'ancienne coutume de Bourgogne* (fourteenth century).

[4] Bracton f. 46b, "Est autem libertas, naturalis facultas ejus, quod quique facere libet, quod voluerit, nisi quod de jure vel vi prohibetur. . . . Cum igitur donatio pura sit et perfecta sine conditione vel servitute imposita, dici possit libera, et cum donatio eum faciat accipientis, et sit libera, et ex libertate sequatur, quod donatorius de re data facere possit, quod voluerit, si rem ulterius dederit, domino suo non injuriatur, cum totum habuerit quod ad ipsum pertinuerit."

[5] Vol. i 87-88.

because they represented very general and very deeply rooted traditional ideas as to the ordering of society. How general and how deeply rooted these ideas were we can see from the fact that during the mediæval period a recrudescence of feudal ideas was always ready to occur, weakening the state and perverting the law.[1] Thus we are not surprised to find that Bracton, when he lays it down that an owner of land can freely or almost freely alienate his land, is conscious that he is laying down a new and an unpopular doctrine; and that therefore his statement of the law is both argumentative and apologetic.[2]

Though the newer ideas as to the rights of owners and the position of the land law were undermining the feudal restraints on alienation, changed social conditions were demanding the imposition of another restraint based upon other grounds. As in the days of Bede,[3] so in the thirteenth century, the evils of gifts of land to the religious in mortmain were beginning to be felt. Lords were deprived of the incidents of tenure;[4] and the land itself was rendered inalienable. Such gifts therefore were opposed to the interests of the lords and offended the prejudices of the lawyers.

In some respects Magna Carta reflects very well the state of public opinion at the beginning of the thirteenth century.[5] In no respect does it do so more faithfully than in the clauses which deal with this question of freedom of alienation. The barons resented the tendency to do away with all restraints upon alienation by their tenants. This, no doubt, was the cause for enacting that, "No freeman from henceforth shall give or sell any more of his land, but so that of the residue of the lands the lord of the fee may have the service due to him which belongeth to the fee."[6] All classes of lay lords saw their interests endangered by the acquisitive capacity of the religious houses. This no doubt was the cause for enacting that, "It shall not be lawful from henceforth to any to give his lands to any religious house, and to take the same again to hold of the same house. Nor shall it be lawful to any house of religion to take the lands of any, and to lease

[1] Vol. ii 408, 415-416.

[2] f. 45b, "Sed posset aliquis dicere, quod ex hoc, quod donatorius ulterius dat et transfert rem donatam ad alios, quod hoc facere non potest, quia per hoc amittit dominus servitium suum, quod quidem non est verum, salva pace et reverentia capitalium dominorum. . . . Cum enim quis tenementum dederit, certum dat tenementum tali modo, ut certas consuetudines recipiat et certum servitium. . . . Et unde de jure plus petere non poterit, si habuerit quod convenit, et sic tollat quod suum fuerit, et vadat."

[3] Vol. ii 68.

[4] Vol. ii 348-349; cp. Y.B. 30, 31 Ed. I. (R.S.) 62.

[5] Vol. ii 208.

[6] (1217) c. 39; Bracton's Note Book case 1248, where the clause was applied to prevent a gift in frankalmoin.

the same to him of whom they were received to be holden. If any from henceforth so give his lands to any religious house, and thereupon be convict, the gift shall be utterly void, and the land shall accrue to the lord of the fee."[1] Both these clauses are vague, because both attempt to deal with problems upon which as yet there had been no need for definite rules. Both demand that some control shall be placed upon freedom of alienation; but the principles upon which that control is demanded are very different. The first represents the desire to maintain the older feudal conception of land-holding; the second the desire to maintain the rights of landowners and to guard the state against a public danger. Both clauses show that the vague customary practices no longer sufficed—that the time had come for positive law to deal expressly with this question of freedom of alienation. They form, therefore, a convenient starting-place for the history of that law. I shall deal (i) with the feudal restraints upon freedom of alienation, and (ii) with the restraints upon alienation to the religious houses.

(i) Feudal restraints upon freedom of alienation.

We must at the outset distinguish the case of the mesne tenant and the mesne lord from the case of the tenant in chief and the king.

(*a*) *The mesne tenant and the mesne lord.*

How far could the mesne tenant alienate his land without the consent of his lord? How far could the mesne lord alienate his seignory without consulting his tenant? These two questions are obviously parts of the same problem, but they involved somewhat different considerations and were answered in different ways.

In answering the first question—how far could the mesne tenant alienate his land without the consent of his lord?—we must begin by noting that alienation might take the form either of subinfeudation or of substitution.[2] If B is A's tenant, B may either enfeoff C of part of his land so that he, B, is C's lord and remains A's tenant; or he may put C in his, B's, place, so that C is now A's tenant, and he, B, drops out entirely. The first is a case of subinfeudation, the second a case of substitution. In the first case Bracton argued strongly that no legal wrong (*injuria*) was done to the lord, though in fact the lord was damaged. B was still his tenant. A could still distrain for B's services on the whole of B's fee. A's incidents of tenure might be diminished in value, but of this the law would take no account. Incidents of tenure were only incidents. If A got his services he must be

[1] (1217) c. 43. [2] P. and M. i 310, 311.

content.[1] The second is a much weaker case for the tenant. Here B drops out, and it would seem that the lord might rightly object to having C, a poor man perhaps, or his personal enemy, imposed upon him as his tenant instead of B. In Edward III.'s reign some thought that in such a case the lord could, before the statute Quia Emptores, have declined to accept the feoffment.[2] Nevertheless Bracton argues that even in this case B has full power to substitute without consulting A.[3] There is a slight hint, perhaps, in one passage that the lord should be allowed to exercise a right of pre-emption; but it is little more than a hint;[4] and in other passages Bracton is clearly in favour of giving to the tenant the fullest powers of substitution.[5] English law has never permitted a "*retrait féodal.*"

The question was finally settled by the statute Quia Emptores[6] (1290). As we have seen, the incidents of tenure were at that date more important to the lords than the services reserved.[7] The tenant wanted the power of free alienation. The lord did not want to lose his incidents. A compromise was made by this statute; and it was a compromise which it was the more easy to make seeing that lords and tenants did not form two exclusive classes. Many, perhaps most, free tenants were both lords and tenants in respect of different parts of their possessions. The statute enacted that "from henceforth it shall be lawful to every freeman to sell at his own pleasure his lands or tenements or part of them, so that the feoffee shall hold the same lands or tenements of the chief lord of the same fee, by such service and customs as his feoffor held before." If part of the land were conveyed the services were to be apportioned. The statute was to apply only to conveyances in fee simple.[8] It was settled in Edward II.'s reign that the lord could not evade the statute by

[1] f. 45b, "Non enim fit donatio tali modo, quod habeat custodiam terræ et heredis et maritagium, sed quod habeat homagium et servitium."

[2] Y.B. 17, 18 Ed. III. (R.S.) 324 *per* R. Thorpe, *arguendo*, "Before the statute *Quia Emptores*, even though my tenant aliened in fee simple no law compelled me to accept the feoffment; then my avowry was good upon my former tenant and upon his heirs, and I should avow upon the heirs for a relief, notwithstanding the conveyance."

[3] f. 81, "Si tenens cum homagium fecerit domino suo, se dimiserit ex toto de hæreditate sua et alium feoffaverit, tenendum de domino capitali, et quo casu tenens absolvitur ab homagio et extinguitur homagium, velit nolit dominus capitalis."

[4] ff. 46, 46b—in a case where there is a feoffment with a condition against alienation, if the feoffee has alienated, and the lord does not immediately eject the alienee, but only ejects him after an interval, he should restore the land to the feoffee, "nisi forte dare voluerit valorem vel precium."

[5] Above 77, 78.

[6] 18 Edward I. c. 1.

[7] Vol. ii 348-349.

[8] 18 Edward I. c. 1 § 3; Y.B. 21, 22 Ed. I. (R.S.) 641, "The statute *Quia Emptores terrarum, etc.*, is understood of the case of one enfeoffing another in fee simple, and not in fee tail;" see Y.B. 3, 4 Ed. II. (S.S.) for an illustration of the effect of its working.

charging fines upon alienation.[1] The result was to give to the tenant in fee simple full power of alienation by way of substitution, but to stop all subinfeudation when a grant was made in fee simple. If a mesne lord has at the present day a tenant in fee simple of lands of free tenure, that tenure must have been in existence before the year 1290.

There are two features of this settlement of the question of the freedom of alienation to which it is necessary to call attention at this point. Firstly, because the statute stopped all subinfeudation when a grant was made in fee simple, it set in motion a process by which in course of time the importance of merely tenurial principles has been immensely decreased. "It is," says Challis,[2] "the general effect of the statute of Quia Emptores, so often as a mesne tenure for a fee simple is extinguished by union of the land and the lordship in the same hands, to prevent the mesne tenure from being ever again revived by any act of the parties. Thus, by the gradual extinction of the mesne tenures, the seignory of all freehold lands held for a fee simple tends to become concentrated in the crown." The principle and consequences of tenure tend to become simplified; and that means the removal of a great obstacle to the conception of the land law merely as property law. This, as we shall see, is illustrated by the history of the law as to land which is held by copyhold tenure. To this day the consequences of tenure form a real hindrance to its profitable user. Secondly, the statute did not extend to the crown.[3] The king was the one person who was always lord and never tenant. He could freely alienate already, and could therefore gain no advantage by the statute. By insisting on his right to prevent his tenants in chief from alienating he could derive some pecuniary benefit; and, as the statute bound them, he would still be assured of his incidents of tenure if he allowed them to sell their lands. Moreover, as we shall see, the public position of the king and his tenants in chief to some extent differentiated them from the mesne lords and their tenants.

We must now turn to the second question—how far could the mesne lord alienate his seignory without consulting his tenant? There are, as Maitland has pointed out,[4] two difficulties involved

[1] R.P. i 298 (8 Ed. II. no. 36); for later cases which declared void all attempts to restrict alienation see 33 Ass. pl. 11; Y.BB. 14 Hy. IV. Mich. pl. 6 (at p. 3); 21 Hy. VI. Hil. pl. 21; 8 Hy. VII. Hil. pl. 3; 13 Hy. VII. Pasch. pl. 9; in the last cited case Brian, C.J., at p. 23 interrupted Keble, who was trying to argue that a tenant in fee simple could be bound by condition not to alienate, and said, "que ils ne vouloient luy ouir a arguer a cest conceit, pur ceoque il est merement incontre nostre comon erudition, et est or in manner un principal;" for Littleton's classical exposition of this principle, see below 85.

[2] Real Property 22.

[3] Ibid 20, 21.

[4] P. and M. i 328.

in the alienation by the lord of his seignory. (1) There is the difficulty in giving to a tenant, who has contracted to serve one lord, another. This, it will be observed, is a precisely similar difficulty to that which is involved in allowing a tenant to substitute another for himself. It is, as Maitland calls it, "a feudal difficulty;" and if it had stood alone probably it would not have been allowed to stand in the way of a free alienation of the seignory. Mere feudal difficulties were, as we can see from the converse case, apt to be disregarded by royal judges.[1] But (2) there was another difficulty—a legal difficulty, which in the eyes of those same royal judges was naturally treated with more respect. How could a lord, who was not seised of the land in demesne, deliver seisin of the land which he held only in service?[2] The answer was that he could not do so unless the tenant attorned to the new lord, i.e. recognized him as his lord. Perhaps he might at one time have refused to attorn; but in the thirteenth century a writ was invented, called *per quæ servitia*, by which the tenant could be compelled to attorn when the seignory was conveyed by fine.[3] It is true that a tenant who had done homage to his lord could object to having his homage transferred[4]—though the lord could not, as we have seen, prevent the tenant from abandoning his land, and so freeing himself from the duties imposed upon him by the ceremony of homage.[5] "A lord," it was truly said, "cannot so lightly get rid of his tenant as a tenant can of his lord."[6] This seeming unfairness to the lord may be due to the fact that the lord's duties were regarded as contractual in their nature—as a sort of chose in action which could not be assigned;[7] whereas the tenant's duties were bound up with the land, and, so to speak, ran with it, so that they were assignable with the land.[8] However this may be, it is clear that the rule preventing a transfer of the tenant's homage placed no serious impediment on the assignment of a seignory. On such a transfer the tenant's services could always be transferred by attornment whether the tenant consented or not;[9] and when

[1] Above 78; Madox, Form. no. 512 (a deed of Hy. II.'s time) in which a tenant makes an exchange with his lord, and confirms the lord's grant in frankalmoin of the land originally belonging to him.

[2] Below 100.

[3] P. and M. i 330; Bracton's Note Book cases 948 and 1622; Y.B. 33-35 Ed. I. (R.S.) 314. It seems that the recognition could take the form either of the oath of fealty or payment of rent, Y.B. 3, 4 Ed. II. (S.S.) 17, 157.

[4] Bracton ff. 81b, 82.

[5] Above 79-80.

[6] Y.B. 3 Ed. II. (S.S.) 171.

[7] Bracton, f. 78b, defines homage in the terms of the Roman definition of obligatio; as to the non-assignability of choses in action at this period see below 92; Bk. iv Pt. II. c. 2 § 3.

[8] Y.B. 14 Hy. IV. Mich. pl. 6 (p. 4) "un chose que passa ove la terre."

[9] Bracton f. 82, "Homagium dividi nec attornari non potuit contra voluntatem tenentis, licet servitium dividi posset et attornari, et sic videtur quod servitium

the ceremony of homage ceased to be performed the limitation itself became obsolete.

(*b*) *The tenant in chief and the king.*

Magna Carta, as we have seen, drew no distinction between the capacity of the mesne tenant and the tenant in chief to alienate their lands.[1] But between 1217 and the end of Edward I.'s reign a wide distinction in respect of freedom of alienation was drawn between them. In 1256[2] the king issued an ordinance which forbade all tenants in chief to alienate without his licence, and ordered the sheriff to seize all lands so alienated. The reason assigned for the ordinance was that by reason of such alienations the king lost his incidents of tenure, and that his tenants were so impoverished that they could not perform their due services. Britton,[3] Fleta,[4] the so-called statute Prærogativa Regis,[5] the Quo Warranto enquiries,[6] the articles of the Eyre[7] and the Year Books,[8] all assume that this is the law. These authorities all make it clear that land held by serjeanty (which, as we have seen, was always held directly of the crown[9]) could not be alienated at all.[10] Land held in chief by knight service, and probably all land so held by any free tenure, either could not be alienated at all, or could not be alienated so that the tenant was disabled from performing his due services. In the fourteenth century the traditional view held in the law courts was that this difference between the position of the tenant in chief and other tenants arose in Henry III.'s reign.[11] Having regard to the ordinance of 1256, this view was probably substantially correct. There was certainly more truth in it than in the view held by Parliament that the king's right was based on the apocryphal statute Prærogativa Regis.[12] However, whatever was the basis of the king's right, he clearly had an indefinite right at the beginning of the fourteenth century to prevent his tenants in

attornari poterit in omni casu, et contra voluntatem tenentis ipsius, licet homagium non possit."

[1] Above 78.

[2] L.Q.R. xii 299-301; it is perhaps this ordinance to which *Hankford* referred, when he said, Y.B. 14 Hy. IV. Mich. pl. 6 (at p. 4), "Jeo die expressement que en temps de roi Henry le tenant le Roy purra avoir aliener auxy frank tenement come le tenant d'ascun auter sans ascun fine."

[3] i 222.

[4] p. 178.

[5] As to this document see vol. i 473 n. 8.

[6] Vol. i 662 articles 2 4.

[7] Britton i 71.

[8] Y.BB. 32, 33 Ed. I. (R.S.) 38; 33-35 Ed. I. (R.S.) 306.

[9] Above 50.

[10] Prærogativa Regis cc. 6 and 7 only mentions land held by serjeanty and knight's service; Y.B. 14 Ed. III. (R.S.) 144, 146.

[11] Y.B. 15 Ed. III. (R.S.) 156-158; 20 Ass. pl. 17; 26 Ass. pl. 37; 29 Ass. pl. 19; Y.B. 14 Hy. IV. Mich. pl. 6.

[12] R.P. ii 265; a view also propounded by Willoughby, J., in Y.B. 20 Ed. III. (R.S.) ii 232.

chief from freely alienating their lands. The extent of the right was gradually settled by statute. It was enacted in 1327 that lands held of the king *ut de honore* should be freely alienable, and that, if lands held of the king *ut de corona* were alienated without the king's licence, he would not hold the lands forfeit, but would exact only a reasonable fine.[1]

One reason for this distinction between the position of the tenant in chief and the mesne tenant may perhaps be found in the more or less public position which many tenants in chief held; and in this connection it may be noted that the Prærogativa Regis mentions the case of tenants by knight service and serjeanty,[2] and that Britton specially mentions earls, barons, knights, and serjeants.[3] As between mesne lord and mesne tenant the land law had become property law; but this was not altogether the case as between the king and his tenants in chief. The king's court and the common law had no doubt sapped the political strength of the feudal baron; but that court was itself organized and staffed by officials whose names and duties recalled the days of feudalism. The state which had sapped the strength of feudalism was still organized on a feudal model. This naturally tended to emphasize the older view that the high officials of the state held both their official estates and their offices by the same tenure; and that the king was therefore entitled to exercise some control over all alienations either of land or of office. A rule applied to one class of tenants in chief was easily applied to all; and thus the very cause which promoted the free alienation of land in the case of the mesne tenant, may have hindered it in the case of the tenant in chief. Moreover, as we have seen, the king, who was always lord and never tenant, had not the same interest as other lords in allowing freedom of alienation on the terms settled by the statute Quia Emptores.[4]

But such a rule, when applied to all tenants in chief, became more and more inconvenient, as, owing to the operation of the statute Quia Emptores, more and more land came to be held directly of the crown. The law as settled in Edward III.'s reign gave to the crown one more feudal incident—the fine for

[1] 1 Edward III. st. 1 cc. 12 and 13; cp. 33-35 Ed. I. (R.S.) 306—perhaps a case of land held *ut de honore*, and Hengham's doubt as to whether the tenant could or could not alienate may be based on this. In Y.B. 20 Ed. III. (R.S.) i 90 it is stated in argument that then no tenant in chief could subinfeudate. By the statute 34 Edward III. c. 15 all subinfeudations made by tenants in chief under Henry III. and his predecessors were confirmed; the statute of 1327 was always taken to apply to tenure by serjeanty, Cromwel's Case (1601) 2 Co. Rep. at ff. 80b, 81a.

[2] Above 83 n. 10.

[3] i 222, "Neither can earls, barons, knights, or serjeants who hold in chief of us, so dismember our fees without our leave as that we may not lawfully eject the purchasers."

[4] Above 80.

alienation; but it left all tenants free to alienate their lands. Restraints on alienation based upon feudal principles had ceased to exist. We shall see, when we come to trace the history of the estate tail, that the courts were astute to prevent the creation of of any new restraints upon this freedom of alienation.[1]

The result of these developments was so to strengthen the bias in favour of freedom of alienation which the common law had always possessed, that it came to be regarded as a fixed principle depending upon "reason" or public policy. This feeling comes out very clearly in many of the Year Books,[2] and was stated in its final form by Littleton.[3] "If a feoffment be made upon this condition that the feoffee shall not alien the land to any, this condition is void; because when a man is enfeoffed of lands and tenements he hath power to alien them to any person by the law: for if such a condition should be good, then the condition should oust him of all the power which the law gives him, which should be against reason; and therefore such a condition is void." To which Coke adds that such a restraint would, in the case of a chattel, be "against trade and traffic and bargaining and contracting between man and man."[4] Thus it is clear that Bracton and Littleton and Coke all regarded these restraints upon the power of a tenant in fee simple to alienate freely as contrary to public policy; but if they had been asked to give concrete reasons for so regarding them, they would all have assigned somewhat different causes. Bracton would have said that they were contrary to the conception of *dominium*, and would also have emphasized the importance of breaking up the solidarity of the feudal group. Littleton would have emphasized the importance of maintaining the principle of freedom of alienation because it was a principle of the common law. Coke would have had in view the attempt of the landowners to create perpetuities,[5] and he emphasized, as we have seen, the commercial advantage of a free circulation of property. Though the reasons assigned by these three lawyers would have been different, all had in their minds the impolicy of a general restriction on the power of the tenant in fee simple to alienate.

It followed from this that both a condition restraining alienation, not generally, but to a particular person,[6] and a condition that the feoffee shall reconvey to the feoffor, and that if he does not, the feoffor should have a right to re-enter,[7] were valid, because such conditions did not impose either a general or an indefinite

[1] Below 117-120. [2] Above 81 n. 1.
[3] § 360; see Sweet, Restraints on Alienation L.Q.R. xxxiii 242-243.
[4] Co. Litt. 223a. [5] Bk. iv Pt. II. c. 1 § 6. [6] Litt. § 361.
[7] These conditions were very common at this period as they generally formed part of the mediæval family settlement, below 250-251; cp. L.Q.R. xxxiii 248-249.

restraint upon the freedom of alienation. The same reasoning applied also to a restriction upon a tenant of a smaller estate than an estate in fee simple. To such tenants the statute of Quia Emptores had no application, so that there was not the same opportunity for a feeling against restraining alienation by such tenants to grow up. But, right down to the end of the mediæval period, some of the judges were inclined to disallow such restraints even upon these tenants;[1] and it was not till the beginning of the seventeenth century that it was finally decided to allow, in favour of a reversioner, the imposition of a restriction upon the freedom of alienation of a tenant for life or years,[2] but to refuse to allow such a restriction to be imposed upon a tenant in tail.[3] In later law the courts have allowed other forms of modified restraint upon freedom of alienation. But the law relating to them has been confused by a failure to distinguish between restrictions which are invalid because they impose an undue restriction on freedom of alienation, and limitations which fail because they are limited to vest at too remote a date—i.e. because they infringe the rules against perpetuities.[4]

Though the mediæval land law had thus evolved rules which protected the freedom of alienation it had evolved no rules against remoteness of limitation. Such rules were not then needed, because, as we shall see, landowners had very limited powers of creating future estates in the land.[5] Therefore the danger that landowners would use their powers to alienate freely to destroy freedom of alienation had not yet arisen; and it was not till it arose in the latter half of the sixteenth century that rules against perpetuities became necessary. But we shall now see that an analogous danger had arisen during this period owing to the desire of landowners to make gifts to religious houses; but that this danger had been adequately met, even before it was completely realized, by the legislation which prohibited such gifts.

(ii) Restraints upon alienation to religious houses.

I have already said something of the loss of all the incidents of tenure which necessarily followed a gift to a religious house—a gift

[1] See Y.BB. 21 Hy. VI. Hil. pl. 21; 8 Hy. VII. Hil. pl. 3; 13 Hy. VII. Pasch. pl. 91, where Fineux, C.J., at p. 23, and Townshend and Vavisor, J.J., at p. 24 were in favour of the restriction, and Brian, C.J., at p. 23 was against it; Bk. iv. Pt. II. c. 1 § 7.

[2] Bk. iv Pt. II. c. 1 § 7; L.Q.R. xxxiii 243.

[3] Mildmay's Case (1606) 6 Co. Rep. at f. 43a; though he might be restrained from alienation by feoffment or fine because these conveyances had a tortious operation, Y.BB. cited below 119 n. 9; L.Q.R. xxxiii 244.

[4] Gray, Perpetuities (2nd ed.) Introd.; L.Q.R. xxxiii 236-237; on restraints against alienation see Gray's book on this subject, and Mr. Sweet's two articles, L.Q.R. xxxiii 236, 342; on the history of the rules against perpetuities see Bk, iv Pt, II. c. 1 § 6.

[5] Below 134-136.

in mortmain.[1] The clause of Magna Carta was enforced by the Provisions of Westminster[2] in 1259. This clause of the Provisions of Westminster was not re-enacted in 1267; but in 1279[3] the statute *De Viris Religiosis*—the first Statute of Mortmain—put a stop to all sales or gifts of land to religious houses without the king's licence;[4] and this prohibition was extended to all corporate bodies in Richard II.'s reign.[5] Though modern statutes have created some exceptions to the general law,[6] the prohibition has been maintained from the thirteenth century to the present day. It is true that the reasons for the law are no longer the same. The incidents of tenure are things of the past. The law is now maintained because to give land to a corporation is to render it wholly, or almost wholly inalienable. Though a restriction on the freedom of alienation, it is a restriction in name only; for, like the modern rule against perpetuities, it is maintained in order to promote the freedom of alienation.

The history of the elimination of the older restraints upon alienation points to the same conclusion as the history of the free tenures and their incidents—the land law is fast becoming a branch of the private law of property. Thus we find that legal interest in the land law tends to centre rather upon the nature of the estates which persons may have in the land than upon the tenures by which it is held. Littleton's book is a treatise upon tenures; but he deals first, as we have seen, with estates. I must now say something of some of these estates; but before describing them I must first say something of the doctrine of seisin, upon which depends not only much of the learning as to estates, but also the learning as to many other branches of the land law.

[1] Vol. ii 348-349.

[2] c. 14, "Viris autem religiosis non liceat ingredi fœdum alicujus sine licentia capitalis domini, de quo scilicet res ipsa immediate tenetur."

[3] 7 Edward I.; vol. ii 348; attempted evasions of the statute were always met by fresh statutes, 13 Edward I. st. 1 c. 32 (collusive recoveries), 34 Edward I. st. 3; 15 Richard II. c. 5 (preventing conveyances in mortmain by way of use). In the statute Quia Emptores it is stated that nothing in the Act is to enable gifts to be made in mortmain. With respect to leases for years the courts seem to have held that a lease, e.g. for 80 years, which was obviously likely to exceed the duration of a life estate, was hit by the statutes, Y.B. 4 Hy. VI. Hil. pl. 1; but that a lease for 20 or 40 years might be good, Y.B. 3 Ed. IV. Mich. pl. 8 (p. 13) *per* Nele *arg.*; and this view seems to have been approved, see Cotton's Case (1613) Godbolt at p. 192; Heming v. Brabason (1660) O. Bridg. at p. 7; Jesus College v. Gibbs (1835) 1 Y. and C. (Ex.) at p. 147; but it is doubtful whether this distinction is now applicable in view of the definition of "assurance" in the Mortmain Act of 1888, 51, 52 Victoria c. 42 § 10 (i) (ii); see Halsbury, Laws of England viii 367 n. (*g*), where all the authorities are collected.

[4] See Y.BB. 30, 31 Ed. I. (R.S.) 535-536; 32, 33 Ed. I. (R.S.) 499 (a licence in mortmain); 1, 2 Ed. II. (S.S.) 14 (an enquiry as to a collusive evasion of the statutes); 14 Ed. III. (R.S.) 1 ii 1 iii (an apparently successful evasion by means of collusive litigation).

[5] 15 Richard II. c. 5.

[6] 51, 52 Victoria c. 42,

§ 5. Seisin

Seisin means possession. It is derived from the same root as the Roman *possessio* and the German *besitz*. "The man who is seised is the man who is sitting on land; when he was put in seisin he was set there and made to sit there."[1] If we except those parts of the land law which deal exclusively with the nature of the free tenures and the definition of their incidents, it would be true to say that this branch of the law is dominated by the conception of seisin. The meaning and consequences of seisin constitute the background of principle which gives colour and unity to its various rules. We have seen that it was just about the time when Littleton was writing his Tenures that the term "seisin" was appropriated to describe the possession of freehold estates in land, while the term "possession" was appropriated to chattels.[2] This separation shows that the seisin of freehold estates in land, which was protected by the real actions, had come to differ from the possession of chattels, protected only by personal actions. I have said also something as to the meaning and consequences of seisin at different periods in the history of the law.[3] Here I shall attempt to sum up the history of the development of the doctrine, and to estimate the position which it held in the law at the end of this period. But before I endeavour to explain the mediæval doctrine upon this matter it may conduce to clearness if I recall what may be called the modern—the "general jurisprudence"—point of view.

Ownership and possession are sufficiently familiar topics in mature systems of law. Such systems of law regard ownership as the relation of a person to a thing which gives to the person indefinite rights enforceable at law to or over the thing. When considering a question of ownership we attend not so much to the physical relation between the person and the thing, as to the question whether the relation between them has been so constituted that the law will annex to it these indefinite rights; for ownership is pre-eminently a right. Possession, on the other hand, expresses the physical relation of control exercised by a person over a thing. The possessor may or may not be owner, according to whether or not this physical relation of control has been constituted under conditions to which the law annexes the rights of ownership. If in all cases where such physical control existed the law annexed the right of ownership, the law relating to possession would merge in the law relating to ownership. But this is not the case. For many causes arising both ex contractu and ex delicto the owner

[1] P. and M. ii 29, 30. [2] Vol. ii 581 and n. 2.
[3] Ibid 205, 262, 353-355, 581, 582-588.

of property is not the possessor. The relationships between persons and things grow more complex with the growing complexity of social relations;[1] and the law must define the many kinds of subordinate control excercised by persons over things which co-exist together with or in opposition to the principal control which it calls ownership. Thus we get a law of possession which, both in Roman and in English law, covers many species of subordinate control, and exists side by side with a law of ownership.

This general theory is, of course, a generalization from the rules of mature systems of law. Primitive systems of law have no such abstract conceptions as those of ownership and possession. They are concerned rather with the invention and maintenance of rules for the settlement of disputes.[2] Here I must trace the history of the process by which the common law attained a theory about the ownership and possession of land. The history of that process is, in relation to the land law, the history of the development of the doctrine of seisin.

We have seen that the common law has not, and never has had, any theory of ownership like that of the Roman law. It had no action like the Roman *vindicatio*, which protected an abstract right of *dominium*. The writ of right simply decided the question of better right to possession as between the demandant and the tenant. In other words, it was a form of action directed, not to establish the abstract right of the demandant, but to settle a dispute between two litigants.[3] No doubt when Henry II.'s reform allowed the question of better right to be tried by the grand assize[4] instead of by battle, more consideration could be given to the title of the parties. It is true that Bracton, using Roman terms, talks of the action as establishing the *proprietas* of the successful party.[5] But that the *majus jus* established by the writ of right was not the *proprietas* of Roman law we may see by asking what the demandant must plead and prove in order to substantiate his claim, and what the tenant can plead in order to substantiate his defence. The demandant must plead and prove that he or his ancestors had a better right to the possession than the tenant or his ancestors at some period within the existing statutes of limitation.[6] This he will do by showing that he has been in possession or has done such acts—e.g. collected the rents from tenants or made livery of seisin—as only a possessor could do. The tenant must deny the

[1] See the passage from Bentham cited Pollock and Wright, Possession 6-10.
[2] Vol. ii 78-79. [3] Above 7. [4] Vol. i 328.
[5] f. 434b, "Est etiam jus proprietatis quod dicitur jus merum." It is probable that this "*jus merum*" is a mistaken translation of the Anglo-French *mere dreit*, i.e. *majeur droit*, P. and M. ii 77; cp. Bracton's Note Book case 240.
[6] Above 7, 8; L.Q.R. ii 484.

demandant's claim and prove any facts he alleges to show that he has the better right to possession. But he cannot say to the demandant, "You have not proved your case because X, a third person, through whom neither of us claims, has a better right than either of us, and this I am prepared to prove."[1] Seeing that the demandant need only prove a better right to possession and not an absolute *dominium*, the tenant cannot rely upon a *jus tertii* through which he does not claim.[2] The question at issue is the better right of the parties to possession; and if this be the issue such a *jus tertii* is merely irrelevant.[3] This, it would seem, is a principle which is common to many bodies of Germanic law.[4]

Even the writ of right, therefore, did not decide the abstract question of ownership. Still less was such a question at issue in the newer forms of action—the assizes and the writs of entry—which, as we have seen, superseded the writ of right.[5] The question at issue in these forms of action was simply the question of seisin. "Did A disseise B?" "Did A enter on the land through (*per*) X, which X disseised B?" An answer is required to a question of fact. No question of law is directly suggested; though, as we have seen, many such questions might incidentally arise. No doubt in describing the nature and incidents of seisin, and the modes in which it could arise and terminate, Bracton borrowed much substantive law from Rome.[6] No doubt he was almost bound to do so, because the novel disseisin (the most summary of the actions which protected seisin, because it excluded all questions as to the right to seisin) was borrowed from Roman sources. No doubt he often talks as if the right to seisin protected by the writ of right could be compared with the *dominium* protected by a *vindicatio*, just as truly as the seisin protected by

[1] But in Y.B. 6 Ed. II. (S.S.) 244-245 a third person, not a party to the plea, was allowed to intervene to prove that he was the person really entitled; this, however, is a very different matter to allowing one of the parties to invoke in his defence the right of an absent third person.

[2] P. and M. ii 75, 76; the principle may also be illustrated from the pleadings in cases of inheritance, see below 180-181. Note that the rules as to the conditions under which the *jus tertii* may be pleaded as a defence by the tenant in possession were different in the later action of ejectment, and therefore in modern law, Bk. iv Pt. II. c. 1 § 2.

[3] This principle is illustrated by Y.B. 20 Ed. III. (R.S.) ii 248-252; in that case a gift was made to E. and the heirs of her body by W.; a writ of formedon in the descender was brought by J., and it was said in the writ that the land ought to descend to J. "post mortem prædictorum W. et E.;" the writ was abated because, the gift being to E., there was no need to recite the death of W. in the writ; to the argument that it was necessary to recite it because he might have been entitled to an estate by the curtesy, Willoughby, J., said, "Although you would not have an action against him (W.), or against anyone who had his estate, at any rate your action would be maintainable against a stranger who could not claim anything of his estate."

[4] Schulte, Droit de L'Allemagne (Tr. Fournier) 448-453, 467-468, and the authorities there cited.

[5] Above 8-14.

[6] Vol. ii 282.

the novel disseisin could be compared with the *possessio* protected by the interdicts. But the position in English law of the seisin protected by the novel disseisin or the writs of entry differs from the position of the Roman *possessio* because the English law knows no *dominium* with which it can be compared. English law only knows various rights to seisin, some more recent, some less recent, which can be asserted by different forms of action.[1] In Roman law *dominium* and *possessio* can be and are sharply contrasted. In English law we can only compare seisin with seisin, the seisin protected by the writ of right with that protected by the writ of entry, the seisin protected by the writ of entry with that protected by the novel disseisin—the older, in short, with the more recent. English law protects seisin and various rights to seisin of varying dates by different forms of action.[2]

It is seisin therefore, or the right thereto, which the law protects; and the law follows out rigidly the consequences of this conception. (1) The person seised is the person who can exercise all the rights of an owner. (2) The person not seised may have a right of entry or action; but till he has entered or recovered seisin by action he has none of the rights of an owner. Let us look at the results which flow from these two principles.[3] (1) The person seised may make a feoffment and convey an estate in fee simple—a tortious estate, it may be, but still an estate in fee simple.[4] "The disseisor claimeth fee and right and freehold till his tort be proven."[5] "Every tenant by disseisin has a fee until his estate be defeated."[6] "A feoffment *de facto* made by them that have such interest or possession [as a lessee for years or a tenant by elegit] is good between the parties and against all men, but (i.e. except) only against him that hath a

[1] Bracton ff. 434b, 435, is discussing the case where, after the death of an ancestor, a younger son gets seisin, dies seised, and transmits the land to his heirs; in that case, "transmittit ad hæredes suos cum jure possessionis quod ipse habuit quasi in fœdo quoddam jus proprietatis cum jure possessionis ipsius, quod sequi debeat primam proprietatem, et sic de hærede in hæredem usque in infinitum, et sic erunt ibi duo jura proprietatis per diversum descensum et diversas personas et gradus. Sed unus eorum majus jus proprietatis habebit propter prioritatem, sicut frater antenatus et ipsius hæredes, et illi minus jus qui descendunt de fratre postnato . . . plura possunt esse jura proprietatis, et plures possunt habere majus jus aliis."

[2] Y.B. 14, 15 Ed. III. (R.S.) 218, "Every one who is named in the writ of assize can deny the *plaintiff's title, that is to say, the seisin;*" Lightwood, Possession of Land 150, truly says that in English law "there is no marked distinction between ownership and seisin. Seisin is the source of a right of property which is always valid as against persons with an inferior right. It may be defeasible because some one else has a better right, but as against a stranger at any rate it is good."

[3] See Maitland's article on "The Mystery of Seisin," L.Q.R. ii 481 seqq.; and cp. H.L.R. iii 25-28.

[4] Bracton f. 11; Litt. § 611; Challis, Real Property (2nd ed.) 371; Williams, Seisin 7.

[5] Y.B. 6, 7 Ed. II. (S.S.) 89 *per* Scrope, J.

[6] Y.B. 11, 12 Ed. III. (R.S) 202.

right."[1] This principle was followed out logically. The heir of the person seised will succeed to his property;[2] and it is only a person seised who can be a stock of descent.[3] His widow is entitled to dower.[4] The husband of a woman seised as of wrong is entitled to curtesy.[5] Rights appendant to the estate belong to the disseisor.[6] The fact that there is a person seised of the land will prevent that land escheating to the lord, even though the disseisee — the person entitled—has died without heirs.[7] Similarly, it seems that all the ordinary incidents of tenure affect the tenant seised as of wrong just as if he had been the rightful tenant.[8] (2) The position of the person disseised is the exact converse of this. He has nothing which he can alienate. To alienate effectually he must make livery of seisin.[9] Not having seisin, he has only a right of entry or action—a chose in action, which, till 1845, was inalienable.[10] At common law, said Mountague, C.J., in 1553, "he who was out of possession might not bargain, grant or let his right or title, and if he had done it, it should have been void."[11] His right of action may, it is true, descend to his heir; but the time will come when, owing to the operation of statutes of limitation, even that right of action will be lost. His wife is not entitled to dower. He, if married to a woman disseised, is not entitled to curtesy. Of a mere right of action, and in the Middle Ages of a right of entry, there could be no escheat; nor did such rights render those entitled thereto liable to any of the other incidents of tenure.[12]

Now we have seen that at the end of this period the rights of the disseised tenant as against the disseisor were so far extended that he had in most cases a right of entry;[13] and that his rights

[1] Co. Litt. 367a.

[2] Bracton f. 435; 15 Ed. III. (R.S.) 330; cp. 5 Ed. II. (S.S.) (1311-1312) 204-207.

[3] Y.B. 20 Ed. III. (R.S.) ii 12-16; below 172.

[4] Y.B. 13, 14 Ed. III. (R.S.) 314, 316; cp. Y.B. 5 Ed. II. (S.S.) (1312) 177 *per* Spigurnel, J.

[5] L.Q.R. ii 488; cp. Litt. §§ 393, 394.

[6] Y.B. 14 Ed. III. (R.S.) 24; but see Y.B. 8 Ed. II. (S.S.) 196-197 where a doubt is expressed as to an advowson appendant.

[7] L.Q.R. ii 486, 487 and references there cited, especially Y.B. 6 Hy. VII. Mich. pl. 4 (p. 9) *per* Brian; for the later modification of the law on this point see Bk. iv Pt. II. c. 1 § 2.

[8] L.Q.R. ii 487, 488; Y.B. 17, 18 Ed. III. (R.S.) 324. [9] Below 221-222, 224.

[10] Up till 8, 9 Victoria c. 106 § 6; see Ames, H.L.R. iii 337, "The rule that a chose in action is not assignable was a rule of the widest application. A creditor could not assign his debt. A reversioner could not convey his reversion, nor a remainderman his remainder. A bailor was unable to transfer his interest in a chattel. And . . . the disseisee of land or chattels could not invest another with his right to recover the res or its value;" cp. Y.B. 3, 4 Ed. II. (S.S.) 9 where to a writ of forfeiture of marriage it was pleaded that the plaintiff was never seised of the ward.

[11] Partridge v. Strange (1553) Plowden at p. 88.

[12] Rushden's Case (1533) Dyer at f. 5a; L.Q.R. ii 485-488; for later modifications of these rules see Bk. iv Pt. II. c. 1 § 2.

[13] Vol. ii 583-585.

of action were similarly extended by the omission to pass any effective statutes of limitation.[1] We have seen that such cases as the cases of descents which tolled entries, or discontinuances, where the true owner's right of entry could not be asserted against the person wrongfully seised, had come to be anomalous.[2] This meant, not that mere ownership in the abstract was better protected, but that fuller opportunity was given to the better right to recover seisin. The disseised owner was not allowed to dispose of his rights. This would have offered direct encouragement to that maintenance and champerty which Parliament and the judges of the fifteenth century made such determined and such ineffectual efforts to suppress.[3] The way was made easier for him to recover his rights by entry or action. But till he had recovered them he had only a right of entry or action. The disseisor had the seisin. Seisin may be defeasible. It may be made easier by an improvement in legal remedies to defeat it. But this does not curtail the rights of the person seised while he is seised. All through this period and long afterwards the person seised continued to enjoy, the person disseised was deprived of most of the fruits and consequences of property. It is not till a much later date that owners while still disseised have been able to dispose of their rights, or that disseisors while seised have ceased to be able to convey a tortious estate in fee simple by feoffment;[4] and in spite of modern changes much of the old principle still remains.[5] Seisin is still prima facie evidence of ownership. The best right to seisin is still the only form of ownership recognized by English law. "The standing proof that English law regards, and has always regarded, possession as a substantive root of title, is the standing usage of English lawyers and landowners. With very few exceptions there is only one way in which an apparent owner of English land who is minded to deal with it can show his right so to do; and that way is to show that he and those through whom he claims have possessed the land for a time sufficient to exclude any reasonable probability of a superior adverse claim."[6] The earliest statute of limitation[7]

[1] Above 8, 10.
[2] Vol. ii 585-586.
[3] Ibid 416, 452.
[4] 8, 9 Victoria c. 106.
[5] Lightwood, Possession of Land 151, sums up the historical development very well; as he says, the possessor was at first protected even against the owner, but the law "more and more diminished this protection, and more and more admitted matters of title in possessory actions until at length it was only the freeholder taking by descent who was protected as against the true owner, and it was only therefore a descent cast which checked the pleaders on either side in carrying back their tale of wrongs to the respective rights of possession;" this exception was done away with in 1833; and since that date "seisin was still the source of a title good against strangers, but it was no longer protected against the true owner;" cp. Perry v. Clissold [1907] A.C. at pp. 79, 80.
[6] Pollock and Wright, Possession 94, 95.
[7] 32 Henry VIII. c. 2.

did not confer ownership upon the person seised. In so far as it applied to corporeal hereditaments,[1] it simply barred the action of the person who might otherwise have had a better right to seisin. Even our present statutes content themselves with barring the action and extinguishing the right of the person who would otherwise have a better right to get seisin. They do not confer a title upon the person seised. A system of *usucapio* which by lapse of time turns *possessio* into *dominium* would be unnecessary and indeed unintelligible. All the law need do when it wishes to secure the rights of those seised against those who have a better right to seisin is to bar that better right. If they are seised, and if the titles of those with a better right to seisin are barred, they have the best of titles which the law can give;[2] and the fact that this is the principle underlying these statutes of limitation—a truth long since understood by the few students who had cared to study the history of the law—has recently been stated by the Court of Appeal.[3]

This conception is followed out to its logical consequences. When the original owner's right of action and title are extinguished by the operation of the statute of limitation, the title of the person in whose favour the statute was running is rendered indefeasible. It follows that, even though he is not in possession at the moment when the original owner's right and title is barred, he gets an indefeasible title. If he has been disseised and the disseisor is in possession, he can recover possession from him, if he brings his action in time. If he has settled the property by deed or will on X for life remainder in fee simple to Y, both X and Y's titles will be indefeasible for their respective interests. X's heir cannot claim to hold as against the remainder-man because the settlor's title was originally defeasible. The settlor had seisin, had, that is, a title good as against all save the original owner;[4] and the mere fact that that title has now become indefeasible cannot vary the rights of those who claim under it.[5]

[1] As to this see Bk. iv Pt. II c. 1 § 9. [2] Cp. H.L.R. iii 318, 319.

[3] "We have had a great deal of discussion as to the effect of the Statute of Limitations in a matter of this kind. . . . My present view is that the phrase 'statutory conveyance' and so on, is a loose metaphorical term, and that the true view is this, that whenever you find a person in possession of property, that possession is prima facie evidence of ownership in fee, and that prima facie evidence becomes absolute when once you have extinguished the right of every other person to challenge it. That is the effect of s. 34 of the Real Property Limitation Act, and that explains how the person who has been in possession for more than the statutory period does get an absolute legal estate in the fee, and there is no one who can challenge the presumption which his possession of the property gives," in re Atkinson and Horsell's Contract [1912] 2 ch. at p. 9 *per* Cozens-Hardy, M.R.; a good illustration of the misunderstanding which formerly prevailed on the topic will be found in an article in L.Q.R. xxxiv 253, and see Sir F. Pollock's note at p. 260.

[4] See Co. Litt. 367a cited above 91-92.

[5] Pollock and Wright, Possession 95; and for a case in which these principles were applied see Dalton v. FitzGerald [1897] 2 Ch. 86.

The germs of the mediæval doctrines as to seisin can be traced back to the common basis of Germanic custom which we find in those parts of the Anglo-Saxon laws which relate to the possession of chattels.[1] Those doctrines have been developed and modified by the invention of new remedies for the protection of possession, borrowed in the first instance from Roman law; and with those remedies some of the law as to the nature and consequences of possession has also been borrowed.[2] But the basis of primitive doctrine has never been lost, and it has exercised the most permanent influence upon the law. The conditions of the working of the mediæval jury system fell in with a set of primitive ideas which laid the greatest stress upon the fact of seisin; and the cessation of the influence of Roman law in the fourteenth century, which ensured the peculiar development of the jury system,[3] prevented any further borrowing from the Roman ideas of *dominium* and *possessio*. Thus it has happened that at the end of this period the common law has worked out a wholly original set of doctrines as to the possession and ownership of land—doctrines the contents of which are perhaps the most striking of all testimonies to its essential continuity. Seisin is prima facie ownership. The person seised has all the rights of an owner: the person disseised has the right to get seisin by entry or action; but, till he has got it, he has none of the rights as an owner. In other words, the common law recognizes, not *dominium* and *possessio*, but seisin only.

The minds of philosophers and philosophic jurists have been much exercised by the question, Why does the law protect possession?[4] It will be clear that this question loses much of its point when it is asked of a system of law which knows no sharp contrast between *dominium* and *possessio*. The law protects seisin because the person seised is owner till some one else proves a better right to seisin; and therefore to ask why the law protects seisin amounts to asking why the law protects ownership. But perhaps we may say that both the development of the remedies for the protection of seisin in English law, and the development of the remedies for the protection of possession in Roman law, show that the working of remedies, which in the first instance protect possession in order to aid the law of crime and tort, come at length to protect it in order to aid the law of property; and that they end by creating in English law the whole, and even in Roman law no inconsiderable part, of the law of property.[5]

[1] Vol. ii 78-80.
[2] Ibid 282.
[3] Vol. i 317, 318, 320.
[4] Cp. Holmes, Common Law 206-209.
[5] Maitland has shown (P. and M. ii 40-46) that possession is protected (*a*) as a branch of the criminal law, (*b*) as a branch of the law of tort, (*c*) as a branch of the law of property, and (*d*) because possession *per se* gives a kind of right as against the

Such in outline is the mediæval doctrine of seisin. We must now glance at the manner in which that doctrine was applied to the complex facts of land-holding. We shall be struck alike by the simplicity and by the imagination of the fathers of the common law. We shall get a notable illustration of what Ihering has well called "the economy" of primitive legal ideas.[1] We shall get a fresh proof of the manner in which the doctrines of the mediæval land law influenced many branches of the common law.

If seisin means possession, and if possession expresses the fact of physical control exercised by a person over a thing, two consequences would seem to follow. In the first place, two persons cannot at the same time both exclusively possess the same thing. This principle was stated by Coke[2] in the terms of Roman law; it was elaborated by Vaughan, C.J.;[3] and it is recognized by the modern authorities.[4] But in spite of this theoretical difficulty the conception of seisin was applied not only to the interest of the tenant who holds in demesne, but also to the interest of the lord who holds in service;[5] and not only to the tenant of the particular estate, but also to the reversioner or remainderman. As we have seen, it was this extension of the doctrine of seisin which was a principal cause for the evolution of the conception of estates in the land.[6] In the second place, it is difficult to conceive of the possession of an incorporeal thing.[7]

man who is not possessed; all these reasons for the protection of possession can be traced in Roman law; as to (*a*) Code, 8. 4. 7. and 11; as to (*b*) Dig. 43. 16. 1. 6; and 43. 24. 13. pr.; as to (*c*) Dig. 6. 1. 24; and 43. 17. 1. 3; as to (*d*) Dig. 41. 2. 53; and 43. 17. 2.

[1] Ihering, Geist des Romischen Rechts (French tr.) iv. 235, 236, explains it as "l'art de s'aider adroitement des moyens que l'on à sa disposition;" and comparing the ancient law, where this principle is all pervading, with the modern, he aptly says, "Celui qui est passé maître manie les règles de l'art autrement que le commençant. Le maître travaille avec une liberté plus large, car il est plus sûr de sa science. Le disciple plus timide encore, y met aussi une servilité plus grande. C'est l'école, c'est a dire la période de la soumission servile a la règle, qui mêne vers la liberté dans l'art."

[2] Co. Litt. 368a.

[3] Holden v. Smallbrooke (1668) Vaughan at p. 189.

[4] Pollock and Wright, Possession, "Possession is single and exclusive. As the Romans said, *plures eandem rem in solidum possidere non possunt.* This follows from the fact of possession being taken as the basis of a legal right. Physical possession is exclusive or it is nothing. If two men have laid hands on the same horse or the same sheep, each meaning to use it for his own purpose and to exclude the other, there is not any *de facto* possession until one of them has gotten the mastery;" cp. Williams, Seisin 7, "If one person is seised another person cannot be so."

[5] Bracton f. 81, "Nisi ipse vel antecessores sui in seysina fuerint de tenemento illo in dominico vel servitio."

[6] Vol. ii 350-352.

[7] Dig. 41. 3. 4. 26, "Nec possideri intelligitur jus incorporale;" but as we shall see (below 97) this difficulty was not felt in the early common law. "Where incorporeal rights over real estate consist in or admit of exclusive enjoyment, the *de facto* exercise of them is analogous to possession, and is protected by the same remedies," Pollock and Wright, Possession 35.

But, notwithstanding this difficulty, the conception of seisin was extended to the large and miscellaneous list of incorporeal things known to the mediæval common law; and this extension has given rise to some curious and long-lived rules, firstly as to the transference or creation of these incorporeal things, secondly as to the manner in which they were regarded by the law, and thirdly as to the conditions under which they could be enforced and protected.[1]

(1) In the thirteenth century it is quite clear that, for the transference or creation of an incorporeal thing, some act or acts of user, which necessarily varied with the nature of the thing, were as necessary as a livery of seisin in the case of a corporeal thing. These acts were in fact the equivalent of a livery of seisin, for they were the equivalent of that physical apprehension of a corporeal thing, which was the essence of such a livery. Thus the attornment of the tenant was necessary to complete the grant of a seignory, a reversion, a remainder, or a rent.[2] Persons were enfeoffed of rents; even Bracton speaks of the feoffee of a rent;[3] and Britton gives a form of rent charge which assumes that it is necessary to give seisin of the rent to complete the validity of the grant.[4] The earlier Year Books show that this idea was very tenaciously adhered to.[5] Even a fine could not vest an advowson until the donee had presented;[6] and we shall see that this idea can be seen in the wording of some of the earlier forms of conveyance.[7] In fact, so deeply rooted was it in men's thoughts about matters legal that it crops up in quite unexpected places. "It is remarkable," says Nicolas,[8] "that in all the records of the surrender and delivery of the Great Seal, it is particularly stated that on its being placed in the hands of the new Chancellor or the new Keeper he had sealed Writs, Charters, or Patents therewith; as if the actual use of the seal was necessary to prove that he had taken full possession of his office."

[1] The authorities for this subject are P. and M. ii 124-148; Pike, Feoffment and Livery of Incorporeal Hereditaments, L.Q.R. v 29.

[2] Above 82; Y.BB. 33-35 Ed. I. (R.S.) 50 (cited vol. ii 356 n. 3); 1, 2 Ed. II. (S.S.) 80; 2, 3 Ed. II. (S.S.) 65; 15 Ed. III. (R.S.) 428.

[3] f. 169, cited L.Q.R. v. 32. [4] i 270.

[5] Y.B. 21, 22 Ed. I. (R.S.) 608, counsel argues that an advowson is an incorporeal thing of which there can be no transmutation of possession; but it seems to be admitted that the mere charter cannot convey it; it is not yet argued that a charter will convey it because no transmutation of possession is possible.

[6] Y.B. 1, 2 Ed. II. (S.S.) 8 *per* Bereford; and cp. ibid at p. 80 for another dictum by the same judge as to the grant of a seignory.

[7] Below 224.

[8] Records of the Privy Council vi clxxxii; a very good illustration will be found in Letters and Papers xix No. 459 (pp. 292-293) where an account is given firstly of the delivery in 1545 of the Great Seal to Wriothesley to keep while Audeley, the chancellor, was incapacitated, and secondly of the delivery of the seal to him on his appointment a few days later as Chancellor after Audeley's death.

During the fourteenth century the lawyers were beginning to appreciate the distinction between a corporeal and an incorporeal thing. Bracton, indeed, had learned the meaning of the distinction from Roman law;[1] but a knowledge of Roman law was not, as we have seen, very common amongst English lawyers of the latter part of the thirteenth century.[2] "Not long ago," said Herle in 1334,[3] "it was not known what an advowson was, but, when the intention was to give an advowson to another, it would be expressed in the charter that the alienor gave the church." In 1334, however, it was beginning to be seen that the incorporeal advowson was different from the physical fabric of the church. But the first results of the appreciation of this distinction seem to have been to produce considerable confusion in the minds of the lawyers as to the manner in which these incorporeal things could be transferred or created. Some lawyers seem to have thought that they could still be transferred or created by attornment or other act which was equivalent to a livery of seisin.[4] Others thought that a deed was needed as well as an act;[5] others that a deed alone,[6] or even mere words would suffice.[7] But the last view did not prevail; and, when Littleton wrote, it was settled that incorporeal things could pass by deed of grant without livery of seisin.[8] Littleton does not, however, say that a deed of grant is the only way in which such things could be transferred or created. It is probable that he inclined to this view,[9] though he knew well enough that the law on this point was not quite settled. However that may be, the law was settled shortly after he wrote. In 1490 Brian, C.J., laid it down that because an advowson or a

[1] Vol. ii 274; below 140, 141. [2] Vol. ii 287.

[3] Y.B. 7 Ed. III. Hil. pl. 8, cited L.Q.R. v 37.

[4] Y.BB. 6 Ed. II. (S.S.) 130, 131; 6 Ed. II. (S.S.) i 94, 99 *per* Bereford, C.J.; 43 Ed. III. Hil. pl. 4 (cited Pollock and Wright, Possession 54) *Thorpe* says, "I deny your statement that a man cannot grant an advowson without deed, for I say it is well enough to go to the door of the church and say, I grant you this advowson and deliver seisin of the door, and the grant is good enough without a deed; and to this all the justices agreed;" see also Y.BB. 14 Ed. III. (R.S.) xlviii 111, 112; 20 Ed. III. (R.S.) ii 24; L.Q.R. v 35.

[5] Y.BB. 3, 4 Ed. II. (S.S.) 145; 6 Ed. II. (S.S.) i 94, 95 *per* Herle *arg.*; Bereford, C.J., ibid at p. 93 admitted that this might be so in the case of a demandant but denied that it applied to the tenant.

[6] "Note that if common of pasture in any waste be granted to me by specialty, I can use my common as soon as I like, without delivery of seisin, *per Passeley* and *Malmerthorpe*. And *Westcote* said that in such a case where it was found that the plaintiff was never seised, but was disturbed by another depasturing beasts there, he brought the assize and recovered," the Eyre of Kent (S.S.) ii 3; Y.BB. 20 Ed. III. ii 194; 12 Hy. IV. Hil. pl. 13.

[7] "An advowson is a thing which cannot be handled, wherefore it passes by words," Y.B. 14 Ed. III. (R.S.) 14 *per* Willoughby, C.J.; to the same effect Y.B. 17 Ed. III. (R.S.) 56 *per* Sharshulle, J.

[8] §§ 618, 628.

[9] See § 183 where he speaks of "such things which cannot be granted nor aliened without deed or fine."

rent passed by grant it could not pass by livery; and to this view of the law Vavisor agreed, and Townshend did not dissent.[1] Coke was thus warranted in laying it down that "an advowson doth not lie in livery but in grant,"[2] and the same rule obviously must be applied to other incorporeal things. It followed also that, if a fine was levied or a recovery suffered of such things, they vested in the transferee by the effect, not of the execution of the judgment, but of the judgment itself.[3]

But though it had thus been finally settled that these incorporeal things could be transferred or created by deed, and that they did not lie in livery, many of the consequences of the mediæval law remained. This, as we shall now see, was due to the manner in which they were regarded by the law, and to the conditions under which they were enforced and protected.

(2) A lord has a right to seisin of his tenant's services—fealty, rent, knight service, suit of court, and so forth.[4] A person who has charged his land with rent in favour of another (though that other holds nothing of him) has given a real right to that rent. A man who, or a religious house which, has granted a corody to another, gives to that other a real right to the food, clothes, firing, or lodging specified in the grant.[5] A man who grants an advowson or a right of common grants a thing. The remedies provided for the enforcement and protection of all these incorporeal rights make it very clear that they are regarded as things to which the doctrines of seisin can be applied. If the tenant withholds his services the lord may either bring a real action, the writ "of customs and services,"[6] in which he alleges that some ancestor was seised of these services by taking esplees to such a value; or, if he has recently been deprived of them, he may bring an assize of novel disseisin.[7] The lord also has similar proprietary remedies against third persons who disseise him of his tenant's services.[8] Similarly the person entitled to a rent charge[9] or a corody can bring an assize of novel disseisin if he is deprived of his rights either by the person bound to perform or by any third

[1] Y.B. 5 Hy. VII. Pasch. pl. 5.

[2] Co. Litt. 335b; hence I do not regard Pike's strictures on the accuracy of Coke's statement, L.Q.R. v 36, as justified.

[3] Shelley's Case (1579-1581) 1 Co. Rep. at f. 97b.

[4] In Y.B. 3, 4 Ed. II. (S.S.) 18 issue was taken on the question whether or not the lord was seised of the tenant's fealty; in Y.B. 6, 7 Ed. II. (S.S.) 6-7 the effect of a deed of release on an alleged seisin of services was discussed, and it was alleged that the deed proved the seisin to be tortious; see Bevil's Case (1583) 4 Co. Rep. 8a.

[5] "In consideration, as we should say, of some benefit conferred, or some services done or to be done, a religious house undertakes to supply some man at stated intervals with victuals, clothing, or other commodities," P. and M. ii 133; below 152-153.

[6] Above 15-16.

[7] P. and M. ii 125; cp. Y.B. 16 Ed. III. (R.S.) ii 500, 502.

[8] P. and M. ii 126.

[9] Litt. § 236.

person.[1] We have seen that the person entitled to an advowson was protected by a series of real actions similar to those which protected the person entitled to land;[2] and the same proposition is true of the grantee of a right of common.[3]

(3) It was the nature of these remedies by which these incorporeal things were enforced and protected which long preserved many of the principles of the mediæval law relating to them. Thus an advowson might be granted by deed; but, says Maitland, "the grantee until he has successfully presented is in an extremely insecure position."[4] If the church falls vacant he can assert his right to present by the writ *Quare Impedit;*[5] but if a wrongdoer presents before the person rightfully entitled, and six months elapse, the latter cannot sue by a possessory action, for he is not seised; and he cannot sue by a proprietary action because he cannot allege that he or his ancestor has been seised of the right by actually presenting.[6] Similarly the attornment of the tenant of the land was necessary to complete the transfer of a seignory, a reversion, a remainder, or a rent till Anne's reign.[7] "He who hath a rent," says Coke,[8] "hath not taken the explees thereof until he hath seisin by the hands of the tenant of the freehold . . . for he who hath a rent (and especially a rent seck) hath not a perfect or explete or complete estate in the rent until he had seisin thereof." Similarly, "if there be lord mesne and tenant, and the lord will grant the services of the mesne; . . . it is necessary that the mesne attorn."[9] It is not surprising to find that those entitled to these incorporeal things were always careful to get seisin;[10] and that the conveyancers, when they were creat-

[1] 13 Edward I. st. 1 c. 25, "Forasmuch as there is no writ in the Chancery whereby plaintiffs can have so speedy remedy as by writ of Novel disseisin," it is enacted that such a writ shall lie for estovers of wood; profit to be taken in woods by gathering of nuts, acorns, and other fruits; corodies; toll, tronage, passage, pontage to be taken in places certain; keeping of parks, woods, etc., and other bailiwicks and offices in fee; common of turbary; fishing.

[2] Above 24-25. [3] Above 19-20.

[4] P. and M. ii 138; cp. Y.BB. 6 Ed. II. (S.S.) 64; 14 Ed. III. (R.S.) 24.

[5] Above 25.

[6] 13 Edward I. st. 1 c. 5; Y.B. 6 Ed. II. (S.S.) *per* Herle *arg.;* the law was not altered till 7 Anne c. 18.

[7] 5 Anne c. 3; Y.B. 18, 19 Ed. III. (R.S.) 328, 330; Litt. §§ 567-572; L.Q.R. ii 490-492.

[8] Brediman's Case (1607) 6 Co. Rep. at f. 58b; and cp. Y.B. 20 Ed. III. (R.S.) ii 96-98. The position of the holder of a rent seck was not improved till by 4 George II. c. 28 § 5 he got power to distrain.

[9] 6 Co. Rep. at f. 59a.

[10] This is well illustrated by some instructions which Thomas Cromwell gave in 1528 to "Maister Willyam Holgill for possession lyverage and season to be taken in the parsonage of Rudly in Clevelonde;" one of these instructions runs as follows:— "Item that the attorneis named in the deede of Feoffement made to the said Willyam Holgill and others, do enter into thacre of londe named in the said deede of Feoffement and delyver season by a turfe to the saide Maister Holgill, and also to delyver possession and season by the ryng of the churche dore," Merriman, Letters of Thomas Cromwell i 323.

ing or transferring them, were equally careful to insert a clause stating that the transferor has put the transferee "in full and actual possession and seisin of the said annuity or yearly rent by the payment of sixpence of lawful money of England at the time of the ensealing and delivery of these presents in the name of seisin and possession thereof."[1]

The incapacity of an immature system of law to distinguish between a right and the subject of a right, the large space which the land law filled in the law of the Middle Ages, the convenience to a system which worked with a jury of insisting upon some open and notorious act—all worked together to produce these extensions of the doctrine of seisin, which make it important for the right understanding of many branches of the common law. We shall see that the analogous subject—the possession of movables—is no less important in the law, criminal and civil, relating to chattels.

We must now turn to the various estates in the land of which men could be seised.

§ 6. Estates

The growth of the legal conception of an estate in the land at the end of the thirteenth century,[2] and the rapid growth in the following century of detailed rules as to the varieties of these estates, and as to their qualities and incidents, had, at the close of the mediæval period, resulted in the formation of a very definite set of principles both as to their manipulation, and as to the respective rights and duties of those entitled to them. But during the twelfth and the greater part of the thirteenth centuries, during the period, that is, before the common law had acquired its theory of estates, there were no very definite restrictions upon the kinds and the nature of the interests in the land which the landowner could create at his will. He therefore was able to do many things which became impossible to his successors after the various kinds of estates had become fixed and their nature determined by rigid rules of law.[3] In fact, the point of view from which the law regarded his powers to create such estates is not at all like that of modern times. We at the present day see a clear distinction between creating an estate in favour of another and making

[1] The Modern Conveyancer (ed. 1706) i 5. [2] Vol. ii 350-352.

[3] P. and M. ii 27, "It is a mistake to suppose that our common law starts with rigid narrow rules . . . knows only a few precisely defined forms of gift and rejects everything that deviates by a hair's-breath from the established models. On the contrary, in the thirteenth century it is elastic and liberal, loose and vague."

covenants which will run with that estate and bind it in the hands of subsequent owners. If we merely create an estate we simply convey a well-known definite thing with well-known legal attributes. If we attempt to attach new incidents of our own devising to that thing we feel that we are engaging in quite a different legal operation. We feel that we are making in some sort a new law which subjects the holders of that thing to special conditions different from those to which they are subjected by the ordinary law of the land.[1] In the twelfth and thirteenth centuries all kinds of dealing with land were regarded from this latter point of view. The law seems to start from what is really a very primitive standpoint. It seems to think that the normal and regular state of things is that in which the land is occupied and cultivated by the owner in his lifetime, and descends after his death to his kin. All dispositions of land which divert it from these purposes or take it away from the kin are regarded as so many deviations from the common law—permissible deviations it may be, but still deviations. The owner who makes these dispositions is regarded as subjecting the land by the form of his gift to a special law outside the ordinary law.[2]

Before the thirteenth century there were indeed limitations of a vague sort upon the power to alienate imposed in the interests of lords or tenants or heirs;[3] but provided that a landowner had the power to alienate there was very little law as to the modes in which that power to alienate should be exercised. A man could impose almost any set of laws or limitations upon his land by the form of his gift. These large powers were due in part to very primitive ideas as to the things which a man could effect by his own agreement, in part to imitation of the large powers assumed by royal personages in their dealings with land, and in part perhaps, in Bracton's day, to an application of the Roman rules as to what could be done by means of conditions.

In the Laws of Henry I. the maxim that the agreement of the parties will prevail against the law is expressly stated;[4] and we have seen that in Saxon times the number of things which a man could do by his agreement was great. He could give

[1] Cp. e.g. Spicer v. Martin (1888) 14 A.C. at p. 25.

[2] Vol. ii 68, 92; Bracton f. 19b, "Item poterit conditio impedire descensum ad proprios hæredes, contra jus commune, ut si dicam, Concedo tibi tantum terræ ad terminum decem annorum, et post terminum, revertatur ad me terra illa, et si infra terminum decem annorum decessero, concedo pro me et hæredibus meis quod terra illa tibi remaneat ad vitam tuam vel in fœdo, et sic facit conditio liberum tenementum et fœdum et tollit conditio hæredibus assisam mortis antecessoris."

[3] Above 73-74, 76-78.

[4] "Pactum enim legem vincit," xlix. 5; cp. Bracton, f. 17b, "Modus enim legem dat donationi, et modus tenendus est contra jus commune et contra legem, quia modus et conventio vincunt legem."

himself a landlord, an overlord, or a protector.[1] Again, the number of things which the king, or his greater thegns, who imitated him, could do by the written Book were wide and miscellaneous.[2] "From all time the king has been the great land-giver; the model gift of land has been a governmental act; and who is to define what may or may not be done by a royal land book, which if it is a deed of gift, is also a *privilegium* sanctioned by all the powers of state and church? The king's example is a mighty force; his charters are models for all charters. . . . The influence of the royal *privilegia* goes far to explain the power of the *forma doni*."[3] In Bracton's time these vague rules were expressed in the language of Roman law. Bracton found much in the Institutes of the conditions which could be attached to a *stipulatio*. He borrowed this learning; and, when he is considering the nature of the different interests which landowners can create in their lands, he talks of the conditions annexed to the land by the *forma doni* which will put the land outside the ordinary law.[4] Here, as elsewhere, he is clothing an old idea in Roman terms. In fact, this old idea that a person by limiting his land in certain ways was putting that land outside the common law lived on in forms of expression used by lawyers after the kinds of estates known to the law and their incidents had become fixed. It is one of the roots of the modern application of the term "specialty" to mean a deed.[5]

In Bracton's day little had been done to reduce to order the variety of these laws which a landowner could impose upon his land. The old fetters upon the powers of alienation were disappearing. The new law, which will know only certain definite types of estate, had not yet grown up. Thus a landowner may give land and say that it shall not be alienated, or shall not be alienated to a particular class, e.g. to the Jews or a monastery.[6]

[1] Vol. i 21, 22.
[2] Ibid 20, 21; vol. ii 69.
[3] P. and M. ii 12.
[4] Vol. ii 263-264, 281.
[5] Salmond, Essays in Jurisprudence 93, 94, "In our early law an agreement was, in general, regarded, not as a title conferring rights or creating obligations at common law, but as itself the origin of a rule of special law excluding the common law, just as a local custom did. . . . This idea is, indeed, the origin of the term specialty, as applied to a deed. The term expresses the idea of special law as opposed to common law; a deed, as evidence of such a rule of special law, came to be called a specialty: *Especialté qe defet commune droit* [Y.B. 4 Ed. II. 102]."
[6] P. and M. ii 25, 26, and references there cited; Madox, Form. nos. 149, 160, 201, 327, 329, 470; Eynsham Cart. i nos. 197, 390, 450; L.Q.R. vii 63, 64—a precedent of a thirteenth-century conveyance in which alienation to Jews and religious houses is prohibited; Bracton f. 13. The general principle is broadly expressed by Bracton f. 32b, "Ita poterit donator in donatione sua cum consensu accipientis legem, conditionem, et modum apponere quem voluerit, dum tamen hoc non sit in prejudicium sui ipsius et hæredum suorum, quamvis hoc sit contra legem terræ et consuetudinem regni;" cp. Britton i 256, 257; and for an attempt to restrict alienation cp. Y.B. 1, 2 Ed. II. (S.S.) 62.

It is, as we have seen, by no means settled that the landowner cannot devise his land.[1] We shall see that it was this power to determine by condition what should be the fate of land in certain events that enabled land to be given in various ways as security for money lent.[2] This same power enabled landlords to give a remainder after a fee limited on condition[3]—even a remainder which in later law would have been described as contingent.[4] Perhaps the best illustration of the freedom of action assumed by the settlor of land at this period is to be found in the actual settlement of Thomas of Weyland in 1278.[5] Thomas recognized by fine that a manor held by him of the Earl of Gloucester belonged to Geoffry of Ashley. In return Geoffry granted it to Thomas, Margery his wife, and Richard his son. Thomas and Margery were to hold the property of the lords of the fee during their lives. After their death it was to remain to Richard and the heirs of his body, to be held of the right heirs of Thomas. If Richard died without an heir of his body the land was then to remain to the heirs male of Thomas begotten on Margery, to be held of the right heirs of Thomas. If these heirs male died without heirs of their bodies it was to remain to the right heirs of Thomas, to be held of the chief lords of the fee. When Weyland committed felony and abjured the realm, the validity of this settlement came into question. The Earl of Gloucester argued that it was a mere fraud, intended to deprive him of his escheat. The case was so unprecedented that it was argued before all the judges, the barons of the Exchequer, the Council, and Parliament;[6] and the fine, so far as regarded Margery's estate, was upheld. As Maitland points out,[7] this settlement shows us "what a judge of the Common Pleas thought that he could do in 1278; not only could he create remainders after conditional fees, but he could play some tricks with tenures which seem very odd to us who have the happiness of living under *Quia Emptores*."

[1] Above 75. [2] Below 129-130.

[3] L.Q.R. vi 22; P. and M. ii 23, 24, and references there cited.

[4] Bracton f. 13, "Item dare poterit quis concubinæ suæ . . . et pueris suis natis et *nascituris*, vel hæredibus eorum vel assignatis;" cp. a similar statement in Britton i 231; Britton's fourteenth-century annotator says, "In feoffments it behoveth to name certain purchaser, and certain donor, and certain tenement; and those who were not *in rerum natura* at the time of the translation cannot claim part in the thing transferred;" Madox, Form. no. 140 (7 Ric. I.).

[5] R.P. i 66 (19 Ed. I. no. 1); cp. L.Q.R. vi 24; Madox, Form. no. 555.

[6] "Et quia casus consimilis nunquam antea evenit predictus Comes Domino Regi supplicavit quod precipere vellet scrutari Rotulos de Itiner' Justic' de antiquis temporibus, ut de tempore Martini de Pateshulle et aliorum Justiciariorum ante et post; et etiam Rotulos tam de Banco quam de Cancellaria, et de Scaccario de consimili casu si inveniri poterit."

[7] L.Q.R. vi 24.

We may perhaps see some trace of this period of uncertainty as to the kind of interests which landowners could create in the controversy—still not perhaps settled—as to whether the law knows such a thing as a determinable fee.[1] The estates which landowners can create became gradually fixed, not by any definite statute, but by the practice of conveyancers and by the growing precision of other rules of law, notably the rules relating to seisin. We cannot, therefore, expect to find any definite opinion as to the validity of unusual limitations which do not appear to offend against any of the well settled principles of the law.

This wide power of creating interests in land necessarily brought into prominence the distinction between present existing interests, and interests which will only take effect when some condition has been fulfilled, or after the expiration of some definite present interest. It emphasized, that is to say, the difference between estates in possession and estates in expectancy. Within each of these two classes of estates certain forms of limitation became usual, and the law began to have definite rules about their nature. This process, by which certain forms of estate gradually emerged and then became stereotyped, I must now endeavour to trace. I shall deal firstly with the leading classes of estates in possession, and secondly with estates in expectancy.

Estates in Possession

The estate in fee simple.

In Bracton's day it was settled, as we have seen, that a gift to a man and his heirs gave nothing to the heirs.[2] It is probable that the technical legal reasoning by means of which this result was reached must be looked for in the law as to warranty. If an ancestor alienated land with warranty, the obligation of this warranty descended upon his heir. The heir was therefore debarred from recovering the land to which he might otherwise have had a title. A case from Bracton's Note Book,[3] cited by Maitland, shows us a feoffment with warranty by the plaintiff's ancestor pleaded in answer to the plaintiff's claim. As Maitland says, "were it fully established that a tenant in fee simple could alienate without his heir's consent, a reliance on warranty would be out of place."[4] This case, therefore, coming from a time when this rule was very new, gives us a valuable hint as to the

[1] Pollock, Land Laws App. 221-223; L.Q.R. ii 395; iii 399, 403; Gray, Perpetuities (2nd ed.) 31, 32, 556-560.

[2] Above 75.

[3] Case 224.

[4] P. and M. ii 311 n. 1.

mode in which the final result was reached, and renders the more probable Blackstone's conjecture that express warranties were introduced to evade the rule as to non-alienation without the consent of the heir.[1] The forces which set in motion this chain of legal reasoning must probably be looked for (1) in the bias of the courts in favour of free alienation, and (2) in the feeling that any other interpretation might hinder the lord's right to a relief —if the heir was allowed to take as purchaser, it is not at all clear that the lord would be entitled to a relief.[2] Thus the rule which made the word "heirs" a word of limitation merely was in the unusual position of falling in with the policy and doctrines of the king's judges, and of being not altogether opposed to the interests of the great landowners. In other words, it was desired by the two sections of the community whose policy and wishes were the main forces which moulded the mediæval land law.

But though it was settled in the thirteenth century that the word "heirs" was a word of limitation, it was not quite settled, when Bracton wrote, whether or no an estate in fee simple which had been alienated would go back to the donor on the failure of the heirs of the original donee. It is stated in some passages in Bracton that an original donor need not warrant the title of an assignee of his donee unless his original gift to his donee had been to the donee, his heirs *and assigns*.[3] As Maitland points out, a person who could not call upon a warrantor was in a weak position if his right to the land were attacked.[4] Again it is stated by Bracton and Britton, and laid down as law in decided cases, that the estate of a bastard who dies childless will go back to the donor on his death, whether or no he has alienated it.[5] On the other hand, there are other passages in Bracton which point to the later rule that the estate to a man and his heirs will last so long as either the donee, or, if he has alienated, his alienee, has heirs;[6] and we have seen that it was in this sense that the

[1] Comm. ii 301. Maitland tells us, P. and M. ii 311 n. 1, that the clause of warranty becomes a normal part of the charter of feoffment about the year 1200.

[2] Fraudulent feoffments of a man's eldest son to evade wardship were dealt with by the Statute of Marlborough (52 Henry III. c. 6). In Y.B. 3, 4 Ed. II. (S.S.) 184 (no. 69) there is a good illustration of the preference for title by inheritance over title by purchase.

[3] Bracton f. 17b; P. and M. ii 14. [4] Ibid 14 n. 3.

[5] Bracton f. 12b; Bracton's Note Book case 402; Britton i 223; ii 302, and other references cited P. and M. ii 14 n. 2. Bracton f. 20b says that the limitation to heirs *and assigns* was first invented to help the bastard.

[6] Bracton ff. 23b, 48b—it is clear from these passages that difficult problems as to services and incidents due might arise; if A enfeoffs B to hold of him by knight service, and B enfeoffs C to hold of him in socage, and B's estate escheats, so that C now holds of A—is A entitled to wardship of C's heir? "Solvat hoc si poterit," says Bracton, "diligens et providus curialis;" as such questions could but rarely arise after Quia Emptores, the practical obstacle to giving the larger meaning to a gift to a man and his heirs disappeared.

law was finally settled in Edward I.'s reign.[1] Perhaps the settlement made by the statute of Quia Emptores[2] of the vexed question of the power to alienate had something to do with the final result. The recognition by that statute of the power of the tenant in fee simple to alienate freely, and the fact that the alienee must now step into the shoes of the alienor, and hold of his alienor's lord, must have destroyed much of the old reasoning which would have allowed a lord, who had granted to a man and heirs simply, to disregard the assignee of his donee. Every gift to a man and his heirs made after the statute carried with it the power to assign, and had therefore by implication of law the same effect as the older gift to a man, his heirs and assigns.

It is probable that the same two causes which led the courts to hold that the word "heirs" is a word of limitation had much to do with the further development of the principle which is known as the rule in *Shelley's Case*.[3] At the beginning of Edward II.'s reign the rule had not clearly emerged;[4] but towards the end of the reign legal opinion was inclining to it.[5] It was hinted at in 1342.[6] It was laid down clearly enough in 1351[7] and 1365,[8] and was made the basis of a decision in 1367.[9] The cases show us that it was based partly upon the policy of rendering land freely alienable, and partly upon the fact that any other interpretation might have defrauded the lord of his relief. The latter cause is much insisted on by Thorpe in 1367.[10] In addition

[1] Y.B. 33-35 Ed. I. (R.S.) 362; vol. ii 349. [2] Above 80.

[3] (1579-1581) 1 Co. Rep. at f. 104a, "When the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, that always in such cases the 'heirs' are words of limitation of the estate and not words of purchase."

[4] Y.B. 2, 3 Ed. II. (S.S.) 4-7—several reports of the same case from which it appears that the rule was not known as an absolute rule of law; in one report however, at p. 7, *Stanton*, J., says, "First you limit to Roger for the term of his life and afterwards to the heirs of Roger of his body begotten, so that his heirs get a fee tail by means of the conusance. That is not reason."

[5] Y.B. 18 Ed. II. ff. 577, 578—the limitation was to John and Matilda and Walter their son for life, remainder to the heirs of the body of Walter, and if he died without an heir of his body remainder to the right heirs of John; Walter died without an heir of his body in the lifetime of John. John died seised. The question whether he was seised only of a life estate or in fee was the question at issue between his heir and a creditor by Statute Merchant. The court inclined to the opinion that John had the fee; *Trivaignon* said, "Jeo vous proeve que par la fine nul droit ne poit accrestre a dreitz heirs John vivant lui, mes en ascun personne convenit il demorrer; par que apres la mort Walter il convenit demorrer en la personne John."

[6] Y.B. 16 Ed. III. (R.S.) ii 212, 214.

[7] Y.B. 24 Ed. III. Mich. pl. 79 = Bro. At. *Done* pl. 55.

[8] Y.B. 38 Ed. III. Mich. p. 26 *Candish* said, "En ce cas le terre est done a R et K [husband and wife] et J [their son] et les heires engendres, et pur defaut d'issu le remainder a R et K et lour heires: issint en effet auront ils estat de fee simple, coment que les heires de J auront mesne estat en le tail."

[9] Y.B. 40 Ed. III. Hil. pl. 18; cp. Y.B. 11 Hy. IV. Trin. pl. 14.

[10] Y.B. 40 Ed. III. Hil. pl. 18, "Jeo scay bien ou vous voudrez este mes vous avez pledez que vous ne duissomes mie aver pay reliefe, pur ceo que vous estes eins come purchasour . . . mes vous estes eins come heire a vostre pere."

to these reasons we can see also another reason in the necessity of meeting certain technical difficulties which were beginning to be felt as to permitting an abeyance of the seisin—difficulties which in their origin were caused to some extent by the fact that, if an abeyance of the seisin were permitted, there might be no one who would be answerable for the incidents of tenure and other obligations to which the ownership of the land might give rise.[1] If, for instance, land were given to A, remainder to B and the heirs of his body, remainder to the heirs of A, and if B died in A's lifetime without leaving an heir of his body, in whom could the fee be vested if it had not vested from the first in A?[2] It may be well that A had no heirs living either at the time of the gift or at B's death; and it is no answer to say that in such a case A might take for life with a contingent remainder in favour of his heirs; for, as we shall see, it is probable that the law had, by this time, decided against the validity of contingent remainders.[3]

For these reasons the rule had become established during the mediæval period. It was fully accepted in 1568 in the case of *Brett v. Rigden*,[4] which decision made it clear that it applied not only to limitations in a deed, but also to limitations in a will;[5] and it was stated in its classical form in *Shelley's Case*[6] which was before the courts between the years 1579 and 1581. Probably it was the fact that it made for freedom of alienation that then weighed most strongly with the judges; for it was just about that time that the courts were beginning their long struggle against the various devices employed by testators and settlors to create perpetuities. Of its later history it is not necessary to speak at

[1] "The freehold must of necessity be in some one, in order that he who has title or right to it may know against whom he ought to demand it," Willion v. Berkeley (1561) Plowden at p. 229 *per* Anthony Brown, J.; see also Y.B. 2, 3 Ed. II. (S.S.) 4, cited in the next note; for the application of this rule to the limitation of estates in possession and remainder see below 135.

[2] Y.B. 2, 3 Ed. II. (S.S.) 4 *Bereford*, J., asked who, in the case of a limitation to the heirs of a living person, was to do the homage; Y.B. 18 Ed. II. f. 578, *Stonore*, C.J., says, in answer to a contention that if John had aliened without warranty his heir could have claimed, "Donques le fee et le droit apres la morte Walter fuit en nullui personne;" for the limitations in this case see above 107 n. 5; cp. Y.BB. 18, 19 Ed. III. (R.S.) 566; 19 Ed. III. (R.S.) 102.

[3] Below 134.

[4] Plowden 341.

[5] The point actually decided was that if A devises land to B and his heirs, and B dies in the life of A, B's heir takes nothing; the word heirs, it was held, at p. 345, was merely a word of limitation; "it is by no means a just conclusion," it was said, "that because the land should have descended to the heir of Henry, that *ergo* the heir of Henry shall take it immediately, in as much as his father died in the life time of the devisor; for by the same way of reasoning it might be said, that if Henry died without heir, the lord should have had the land by escheat, and that the wife of Henry shall have the third part, because she should have been endowed if it had been vested in Henry."

[6] 1 Co. Rep. at f. 104a, cited above 107 n. 3; for a full analysis and explanation of the case see Challis, Real Property (3rd ed.) 154-161.

any length; for it has been sketched by the hand of a master.[1] Though its status as a rule of law had been clearly recognized throughout the seventeenth century,[2] during the eighteenth and nineteenth centuries doubts began to be cast on it, and limitations suggested. The result was that the rule, during those centuries, gave rise to an enormous mass of litigation. The great controversy in the eighteenth century arose over the case of *Perrin v. Blake*,[3] in which Lord Mansfield and the court of King's Bench, Yates, J., dissenting, attempted to reduce the rule to the level of a mere rule of construction. That decision was reversed by the court of Exchequer Chamber;[4] but it gave rise to a discussion in which Fearne, Hargrave, and Lord Thurlow took part; and it was the cause of quarrels between Lord Mansfield and Fearne, and between Hargrave and Lord Thurlow.[5] Notwithstanding the reversal of the decision in *Perrin v. Blake* the controversy left the position of the rule very uncertain,[6] till its status as a rule of law was finally restored by the decisions of the House of Lords in 1820 in the case of *Jesson v. Wright*,[7] and in 1857-1858 in the case of *Roddy v. FitzGerald*.[8]

The reasons why the rule has, in these later centuries, given rise to so many doubts are somewhat as follows: Firstly, the old reason for the rule, based on the need for preserving the value of the incidents of tenure, had disappeared in 1660; and secondly the more modern reason—its tendency to promote freedom of alienation—had less force at a time when the modern rule against perpetuities was practically settled. But rules for which no reason could be given did not consort well with the rationalistic temper of the eighteenth century. To many lawyers of the eighteenth century, "its feudal origin was a disgrace. Its antiquity was a reproach. Some judges thought that on those grounds it ought to be discountenanced."[9] Among these lawyers was Lord Mansfield. We shall see that Lord Mansfield, aided by some of the puisne judges of the court of King's Bench who had fallen under his influence, was very desirous of reforming some of the older doctrines of the common law on equitable lines, in order both to bring them into line with those principles of general jurisprudence

[1] Lord Macnaghten's judgment in Foxwell v. Van Grutten [1897] A.C. at pp. 667-681.

[2] "I take the rule in *Shelley's Case* to be a positive law of which there can no reason be given," Lisle v. Grey (1679) T. Raym. at p. 319.

[3] (1770) 4 Burr. 2579, much more fully reported in Collect. Jurid. i 283-322.

[4] (1772) 1 W. Blackst. 673 n.; for Blackstone's famous judgment on this occasion see Harg., Law Tracts i 490.

[5] [1897] A.C. at p. 670; for Fearne's views see his treatise on Contingent Remainders (9th ed.) 168-208.

[6] [1897] A.C. at pp. 671-672.

[7] 2 Bligh 1.

[8] 6 H.L.C. 823.

[9] [1897] A.C. at p. 669.

with which his studies in continental law had made him familiar, and to obviate the need for going to the court of Chancery for relief against the strictness of the law.[1] Now it was well settled that in interpreting a will the intention of the testator was the paramount consideration; and that the rule in *Shelley's Case* did not apply to executory trusts. Partly because Lord Mansfield regarded the rule as an obsolete relic of feudalism, partly because he thought that he ought to give a weight to the intention of the testator which a strict enforcement of the rule would have prevented,[2] and partly because he thought that he could thereby give greater weight to equitable considerations,[3] he treated the rule as a mere rule of construction. It followed that it was inapplicable if, on the construction of the whole will, it was clear that its enforcement would frustrate the intentions of the testator.[4] We should note also that it was the more possible to adopt this course because the line between rules which were rules of law and rules which were merely rules of construction was then by no means clearly drawn. We shall see that, from the sixteenth century onwards, many cases had been reported in which the judges had put particular interpretations on particular phrases. Of the growth of this practice, and of the advantages and disadvantages of thus accumulating these rules of interpretation, I shall say something in a later volume.[5] Here it is only necessary to remark that it tended to introduce a confusion which was not present in the mediæval common law, between rules which were merely rules of construction, and rules which, under the guise of interpreting words, really laid down a principle of substantive law.[6]

[1] In Perrin v. Blake, Collect. Jurid. 321-322, Lord Mansfield said, "If courts of law will adhere to the mere letter of the law, the great men who preside in Chancery will ever devise new ways to creep out of the lines of law, and temper with equity."

[2] "I shall ever discountenance, as much as I can, anything which savours of ancient strictness and policy, and when I can possibly depart with justice from an old maxim the policy of which has now ceased, I certainly will. And here I will mention cursorily, that in Shelley's case the rule is confined to *Done* or *conveyance*, and therefore by no means applicable to a will. Wills have always been liberally expounded to fulfil the testator's intention," *per* Willes, J., Collect. Jurid. at pp. 277-278, in which argument Lord Mansfield concurred, ibid at p. 318.

[3] Above n. 1.

[4] "The legal intention (of the testator), when clearly explained, is to control the legal sense of a term of art unwarily used by the testator," Collect. Jurid. at p. 318.

[5] Bk. iv Pt. II. c. 1 § 11.

[6] Thus Fearne, Contingent Remainders (9th ed.) 172, arguing for the rule says, "Is there anything impolitic, anything harsh in deciding that the intention of the testator should never be so far indulged as to control all established *rules of construction?*"; similarly Yates, J., in his dissenting judgment, Collect. Jurid. at pp. 310-311, talks about the rule in Shelley's case as a "legal rule of construction;" the true view is that if a testator uses the expression "heirs" or "heirs of the body" without more, the law says that those words are words of limitation and must be so construed even though the testator's intentions are defeated. It is only if it is clear from the document that he is using these expressions in another sense, e.g. to designate a particular person or class, that the rule does not apply, because the word "heirs" is then used

For all these reasons the operation of the rule in *Shelley's Case* had become obscure and its status doubtful, until, by the decisions of the House of Lords in the last century, its original meaning was, as we have seen, restored, and its status as a rule of law put beyond question. But we must return from this digression to the mediæval common law.

The estate in fee simple conditional and the estate tail.

In the days when the claims of expectant heirs fettered the power to alienate land freely there was, as we have seen, one form of gift which was always permitted. A man could always give a *maritagium* or marriage portion to a woman, usually his daughter or near relative.[1] This *maritagium* was a provision for the woman and her children—a gift to her and the heirs of her body. If she died without children the property reverted to the donor. These gifts might be ordinary or free. In the first case the donee might be bound to do homage to the donor and to perform the forinsec service charged upon the land. In the second case the donee and her issue were free of all services till there had been three descents from the donee;[2] and this, as Maitland points out, gives to gifts in free marriage a "tenurial quality," i.e. those to whom such gifts are made hold by a tenure which is peculiar in that no services are due. The ordinary *maritagium* is a species of estate: the gift in *liberum maritagium* is that species of estate held by a peculiar kind of tenure.[3]

In the thirteenth century these *maritagia* were generally limited either to a woman and the heirs of her body, or to the husband and wife and the heirs of their bodies. "An examination of numerous fines levied during the first years of Edward I. and the last of his father brings us to the conclusion that every tenth fine or thereabouts contained a limitation of this character."[4] We can see also from Bracton that limitations to persons and their heirs, provided that they had an heir of their body, were also well known.[5] Maitland thinks that these forms of limitation were invented because it was at this time that the tenant of land in fee simple was getting the power to alienate his land without consulting his heirs. Settlors tried to fetter this freedom of alienation by expressly stating that the land must go to a particular class of heirs.[6] These gifts were described by the judges as

in a non-technical sense, see [1897] A.C. at p. 663 *per* Lord Herschell; cp. Hawkins, Wills (2nd ed.) 229-231; all the cases of this kind seem to be cases of wills.

[1] Above 74; Glanvil vii 18.

[2] Ibid; Bracton f. 21; Y.B. 30, 31 Ed. I. (R.S.) 388, 390.

[3] P. and M. ii 16 n. 1. The tenant in frank marriage, unlike the tenant for life, was not liable for waste, Y.B. 18, 19 Ed. III. (R.S.) 22.

[4] P. and M. ii 16.

[5] Bracton ff. 18, 18b, 47.

[6] P. and M. ii 18.

conditional fees. It is probable that such gifts so limited were in many cases taking the place of the *maritagium*. Bracton speaks first of these conditional gifts[1] and, directly after, of the *maritagium*.[2] The same course is pursued by the statute De Donis;[3] and we shall see that the incidents of these *maritagia* had some influence upon the construction ultimately placed upon the statute.[4] In later law the *maritagium* was regarded as a particular species of estate tail.[5] It was already taking this position in the thirteenth century, for it was regarded as a particular species of conditional fee. The only mark of its distinctive character and of its ancient origin which it retained in the fifteenth century is to be found in the rules as to advancement and hotchpot which were still applied to gifts of these estates and of these estates alone.[6]

If we wish to understand the interpretation which was put upon these conditional gifts in the time of Bracton we must bear in mind three things:—(1) The existence of the gift in *maritagium*; (2) the fact that the words "heirs" or "heirs of the body" were already regarded as words of limitation;[7] and (3) the fact that there was much authority for the proposition that a gift to a man and his heirs (even though the donee had alienated) would fail upon the failure of the donee's heirs.[8] If we remember these three things we shall see that the manner in which the different kinds of conditional gifts were treated by Bracton was not wholly unreasonable. We may divide them from this point of view into three classes:—

(i) A gift to a man and the heirs of his body by a particular wife gave a life estate to the donee, which expanded into an estate of inheritance on the birth of heirs, and sank again into a life estate if all the heirs predeceased the donee. Whether alienated or not, it reverted to the donor on failure of this class of heirs.[9] We must probably include in this class gifts in *maritagium*.

[1] ff. 17b, 18.
[2] ff. 20b-23.
[3] 13 Edward I. c. 1.
[4] Below 115.
[5] P. and M. ii 16 n. 1; cp. Y.BB. 5 Ed. II. (S.S.) (1312) 226 *per* Bereford, C.J.; 17, 18 Ed. III. (R.S.) 342.
[6] Vol. ii 579; Y.BB. 33-35 Ed. I. (R.S.) 290; 5 Ed. II. (S.S.) (1312) 240.
[7] Bracton f. 17; Note Book case 566; above 75, 106.
[8] Above 106.
[9] f. 17b, "Do tali tantam terram . . . sibi et hæredibus suis quos de carne sua et uxore sibi desponsata procreatos habuerit. . . . Quo casu, cum certi hæredes exprimantur in donatione, videri poterit, quod tantum sit descensus ad ipsos hæredes communes per modum in donatione appositum. . . . Et unde si hujusmodi hæredes procreati fuerint, ipsi tantum vocantur ad successionem, et si taliter feoffatus aliquem ulterius inde feoffaverit, tenet feoffamentum et hæredes tenentur ad warrantiam. . . . Si autem nullos tales hæredes habuerit revertetur terra illa . . . et ita si hæredes aliquando extiterint et defecerint. . . . Ubi nullus extiterit semper erit res data donatorio liberum tenementum et non fœdum . . . cum autem inceperint habere, incipit liberum tenementum esse fœdum, et cum desierint esse, desinit esse fœdum." Perhaps this

(ii) A gift to a man and the heirs of his body gave the donee an estate of inheritance; but on failure of the heirs of his body the estate reverted to the donor, whether it was in the hands of the donee, an heir of his body, or (probably) an alienee.[1]

(iii) A gift to a man and his heirs, provided that he had an heir of his body, gave the donee a life estate till an heir was born; the birth of such an heir, whether or no the heir survived, fulfilled the condition, and the donee could alien as if the estate had originally been limited to him and his heirs; and, if he died without aliening, the estate descended to his heirs general.[2]

The forms in which conditional gifts were limited were various.[3] They were not always clearly in accord with any of these three types. In the result, the interpretation placed upon all gifts to a man and the heirs of his body seems to have been evolved from a mixture of the principles which governed these three classes. If the donee never had an heir of his body, or if, having had such heirs, they all predeceased him, and he died without aliening, the estate reverted to the donor in accordance with the principles applied to the first two classes. If, on the other hand, an heir was born alive (whether or not he survived), the donee could alien for an estate in fee simple in accordance with the principles applicable to the third class; and this estate, according to the newer law as to the duration of such an estate, did not fail with the failure of the original donee's heirs.[4]

The result was a fixed rule of interpretation which constantly disappointed the intentions of settlors. The great landowners wanted such gifts to be interpreted in a manner more in accordance with their interests and with the plain sense of words. The aid

case and the following, in which some kind of reversion clearly existed, account for the view that the writ of formedon in reverter, and possibly in remainder, existed at common law, above 18.

[1] f. 47, "Si autem sic dicatur, Do tali et hæredibus suis, vel tali et hæredibus suis de corpore procreatis . . . statim erit perfecta donatio et fœdum donatorio . . . ab initio, facta traditione, sed resolvitur sub tali conditione, quæ quidem tacita esse possit, sicut expressa, et de necessitate revertitur res data ad donatorem propter defectum hæredum, cum non extiterint, vel si extiterint et defecerint;" whether in either case the failure of heirs or heirs of the body would cause the lands to be taken from the alienee was perhaps not settled, above 106; Bracton's Note Book case 566, and note.

[2] f. 17; f. 47, "Ut si dicatur, Do tali et hæredibus suis, si hæredes habuerit de corpore suo, si tales habuerit, licet defecerint, alii remotiores vocantur ad successionem, sed semper erit liberum tenementum, et non fœdum, quousque tales inceperint."

[3] Madox, Form. vii, viii; P. and M. ii 18.

[4] 13 Edward I. c. 1 preamble; Y.B. 32, 33 Ed. I. (R.S.) 278, 280; cp. Willion v. Berkeley (1562), Plowden at p. 235. It was thought, in later times, that if the gift was to a man and a special class of heirs (e.g. heirs male), and an heir male was born, and predeceased the donee, his birth enlarged the class of heirs and made it possible for the land to go to a daughter; this was not the law at the time of Bracton, nor is there much evidence that it was ever law; it really rests on a strained construction of the preamble of De Donis; see P. and M. ii 17 n. 2, and cp. Challis, Real Property 239, 240.

of the legislator was invoked; and from this point of view we may regard the statute De Donis Conditionalibus (1285) as the ancestor of the long line of statutes passed to remedy a rigid rule of judicial interpretation which has gradually hardened into an inconvenient rule of law.

In order that for the future donees of these conditional gifts should have no power by their alienation to deprive either their issue or the donor or his heirs of the land so given, the statute enacted that the will of the donor clearly expressed in his charter of gift should be observed.[1] It then gave or recognized writs of formedon in the descender and writs of formedon in the reverter to the issue and to the donor respectively; and as we have seen, a writ of formedon in the remainder was shortly after invented, by analogy to the other two writs.[2] In this way the statute turned all fee simple conditional estates in lands of free tenure into estates tail. It applied to all such estates; but it did not affect alienations of such estates made before the passing of the statute.[3]

The literal words of the statute would seem to show that it was only the first donees whose alienation was restrained in the interests of either the heirs of their body, or the reversioner, or the remainder-man.[4] It is true that the word "exitus," i.e. "issue," is used; and it is true that in the developed common law issue means lineal descendants in infinitum. But, if we look at the manner in which the term is used in the statute, there is good reason for thinking that it must be interpreted as meaning issue in the first degree only, i.e. the children of the donee. Unless this interpretation is adopted we cannot, as Mr. Bolland has pointed out, attach any meaning to the phrase "heir of such issue."[5] Under these circumstances it is not surprising to find that there is evidence that many lawyers thought that the statute should be interpreted so as to restrain from alienation only the original donees.[6] It is possible that this interpretation would have

[1] Vol. ii 350. [2] Above 17-18.

[3] Y.B. 32, 33 Ed. I. (R.S.) 278; but it did affect the alienation of a conditional gift when such alienation was made after the statute, Y.B. 3, 4 Ed. II. (S.S.) 43 *per* Herle.

[4] "Ita quod non habeant illi, quibus tenementum sic fuit datum sub condicione, potestatem alienandi tenementum sic datum, quo minus ad exitum illorum quibus tenementum sic fuerit datum remaneat post eorum obitum, vel ad donatorem vel ad ejus heredem, si exitus deficiat per hoc quod nullus sit exitus omnino, vel si aliquis exitus fuerit, per mortem deficiet, herede hujus modi exitus deficiente," 13 Edward I. st. 1 c. 1; on this subject see Mr. Bolland's Introd. to Y.B. 5 Ed. II. (S.S.) (1311-1312) xxv-ix; cp. Reeves, H.E.L. ii 200.

[5] "The 'issue' of the draftsman of the Statute was not the 'issue' of the later lawyer, for to the latter 'the heir of the issue' is just as much and as truly 'issue of the feoffee' as he to whom he was heir, and the words 'heir of the issue' would be a meaningless superfluity; while, on the other hand, if 'issue' means only issue in the first degree, then the expression 'heir of such issue' has a very definite meaning," Y.B. 5 Ed. II. (S.S.) (1311-1312) xxvii.

[6] Y.BB. 5 Ed. II. (S.S.) (1311-1312) 177 *per* Scrope *arg.*; 5 Ed. II. (S.S.) (1312) 225 *per* Scrope and Herle *arg.*; 4 Ed. III. Trin. pl. 4 *per* Shardelow *arg.*

prevailed but for Bereford C.J.'s decisions in 1311-1312 and 1312, that "he that made the statute meant to bind the issue in tail as well as the feoffees until the tail had reached the fourth degree;" and that as "it was only through negligence that he omitted to insert express words to that effect in the statute," it must be construed as if those words were inserted.[1] It is I think fairly clear that Bereford, C.J., considered, not altogether unreasonably, that the paramount intention of the legislature was to deal with those *libera maritagia* which were the occasion of the majority of conditional gifts;[2] and that, to give effect to this intention, the words of the statute must be extended to apply to the donees and to their issue to the extent to which the peculiar tenurial quality of a gift in frank marriage lasted.[3] Until there had been three descents the rights of the issue and the donor must be protected. After that time their rights might well be left to the common law.[4] According to this view the object of the framers of the statute was to preserve the spirit of the old law by giving remedies which would ensure its observance in accordance with the intentions of donors. It was very likely an interpretation which did carry out that object. But, having regard to the words of the statute, it was, according to our modern notions, a most extraordinary way of interpreting it. It was not, however, so extraordinary in days when the judicature, the legislature, and the executive were not so separate as they afterwards became; and we have seen that other judges construed other statutes in a similarly free manner.[5]

Once this construction had been admitted it was not long before the judges refused to stop at the fourth degree, and held that all the heirs of the body—all the issue in the modern sense of that term—were restrained. We do not know the line of reasoning by which this result was reached. Stonore, C.J., in 1331 seems to have thought that the statute restrained all the line of issue from alienating to the prejudice of the reversioner and his heirs; and that therefore *a fortiori* each heir of the body must be restrained from doing anything to prejudice the rights of his issue.[6] It is not quite clear how he arrived at his major premiss—perhaps the fact that the statute refers to "ad donatorem

[1] Y.BB. 5 Ed. II. (S.S.) (1311-1312) 177; 5 Ed. II. (S.S.) (1312) 226.

[2] Above 111-112. [3] Ibid 111.

[4] Having regard to the prevalence of these gifts in frank marriage, probably Anthony Browne, J., was not far wrong when he said, Plowden, at p. 247, that at common law before De Donis "notwithstanding that the donee had issue, yet the donor had a right to have the land again, if the issue failed; and so if there were four descents, and the last issue died without issue, the donor should have had it again before the statute, for the fee simple after issue had was not absolute to this purpose."

[5] Vol. ii 308.

[6] "Lestatut restraint le poar le issue en la tail daliener en prejudice de celuy en le reversion per expresse parol: donque a plus fort home atteindra son poar restraint en prejudice de la tail," Y.B. 4 Ed. III. Trin. pl. 4, cited Y.B. 5 Ed. II. (S.S.) (1311-1312) xxvii n. 2.

vel ad ejus heredem" had something to do with it.[1] If we are going to give a right to all the heirs of the reversioner, it must be given against all the issue of the donee. Possibly, too, the judges were the more inclined to adopt this conclusion by reason of the interpretation which was being placed on the phrase "heirs" and "heirs of the body."[2] It had been held in the first years of Edward II.'s reign that the heirs of the body to whom the estate tail was limited did not, as the result of the statute, take as purchasers.[3] The expression "heirs of the body" was just as much a word of limitation as the word "heirs." But if a gift to a man and his heirs, or to a man and the heirs of his body, gave an estate which might go on descending so long as he had heirs or heirs of his body; and if the statute had given the heirs of the body a particular remedy—the formedon in descender—to recover the land if it was alienated, should not each heir of the body be entitled to that remedy?

However that may be, this interpretation seems to have been put upon the statute early in Edward III.'s reign.[4] As thus interpreted it afforded a complete protection to heirs, remainder-men, or reversioners, not only against alienation by a tenant in tail, but also against the consequences of a forfeiture or escheat incurred by him for treason or felony. In the following century the various kinds of estates tail were gradually evolved and their incidents determined.[5] The position of the tenant in tail, who could never have issue of the class designated in the deed of gift, was defined as a tenant in tail after possibility of issue extinct.[6]

The restrictions placed by the statute, as thus interpreted, upon tenants in tail were soon found to be not only irksome, but productive of great injustice. Parliament was petitioned for its repeal, but these petitions were always rejected. "The truth was that the lords and commons, knowing that their estates tail were not to be forfeited for felony or treason, as their estates of inheritance were before the said Act . . . and finding that they were not answerable for the debts or incumbrances of their an-

[1] Above 114 n. 4. [2] Above 107-108.

[3] Y.BB. 1, 2 Ed. II. (S.S.) 71; 3 Ed. II. (S.S.) 101.

[4] Y.B. 4 Ed. III. Trin. pl. 4; it is stated as a well-known principle in 1346—Grene *arg.* says "You see plainly how he has confessed that J. was issue in tail whose deed is as much restrained by statute as the deed of the tenant in tail himself," Y.B. 20 Ed. III. (R.S.) ii 202.

[5] Challis, Real Property, 266, 267; see a discussion in Y.B. 18, 19 Ed. III. (R.S.) 194-206 as to the effect of a gift to one and the heirs male of his body; and see ibid 114 for a decision as to the effect of a gift to two persons and the heirs of their bodies which substantially lays down modern law.

[6] Y.BB. 30, 31 Ed. I. (R.S.) 46; 17 Ed. III. (R.S.) 580. Such a tenant was not liable for waste, like a life tenant, though in some other respects his interest was similar, Y.B. 4 Ed. II. (S.S.) 188-189 *per* Bereford, C.J.; Co. Litt. 27b, 28; in Y.B. 6 Ed. II. (S.S.) i 82-83 the question whether he should vouch or pray aid is discussed, and it was held he must vouch, ibid 121.

cestors, nor did the sales, alienations, or leases of their ancestors bind them for the lands which were entailed to their ancestors, they always rejected such bills."[1] In default of parliamentary aid the ingenuity of the legal profession set itself to work to evade the statute.

The statute itself had enacted that a fine levied of such an estate should be null and void—nothing therefore could be effected by this means.[2] Nor was the expedient of suffering judgment to go by default in a collusive real action any more efficacious.[3] It was held that judgment in such an action would not bar the issue, the reversioner, or perhaps the remainder-man.[4] Recourse was had in the first instance to the law of warranty.[5] If an ancestor alienated lands and bound himself and his heirs to warrant the title of the donee, the heirs were bound to fulfil this duty.[6] If, therefore, a tenant in tail alienated in fee with warranty, it would appear that the issue would be prevented by the duty which had thus descended upon them from claiming the entailed lands. But it was decided in Edward I.'s reign that such warranty did not bind the issue unless assets had descended to them,[7] and were in their possession when judgment was given on the writ of formedon.[8] This requirement, however, of assets as a condition precedent to the binding force of the ancestor's warranty only applied to a lineal warranty. It did not apply to

[1] Mildmay's Case (1606), 6 Co. Rep. 40.

[2] "No fine, please God, shall ever be levied in respect of tenements held in fee tail, for the Statute says that if a fine, etc.; and we will never allow any fine which we know can be set aside," the Eyre of Kent (S.S.) ii 201 *per* Spigurnel, J.; Y.B. 8 Ed. II. (S.S.) 61, 68-69.

[3] This expedient was used to enable a tenant to convey his land free from a term, to enable a husband to convey his wife's land, to evade dower, and to evade the law of mortmain, till the statutes 6 Edward I. c. 11 and 13 Edward I. cc. 3, 4, 32; see L.Q.R. vi 285.

[4] L.Q.R. vi 285, 286; Litt. §§ 688-690.

[5] Above 105-106.

[6] For illustrations of the workings of this principle see the Eyre of Kent (S.S.) ii 202, iii 142-143; it was held by Bereford, C.J., in 1310 that the recompense in value due from the warrantor was measured by the state of the tenements at the time when he entered into the warranty, so that if they were increased in value by being built on he could not be made liable to the extent of the increased value, Y.B. 3, 4 Ed. II. (S.S.) 11.

[7] Y.B. 33-35 Ed. I. (R.S.) 386; cp. Y.BB. 5 Ed. II. (S.S.) (1312) 133 *per* Scrope, J.; 11, 12 Ed. III. (R.S.) 144; 12, 13 Ed. III. (R.S.) 144. As Reeves points out, H.E.L. ii 240, this rule was probably an extension of the provisions of the Statute of Gloucester (6 Ed. I. c. 3), concerning the alienation of the tenant by the curtesy, to the case of the tenant in tail; see 5 Ed. II. (S.S.) (1312) 133 where Scrope, J., refers to the statute in this connection.

[8] L.Q.R. vi 285 citing Mary Portington's Case (1614), 10 Co. Rep. 38a, "neither the warranty without the assets, nor the warranty and assets without judgment in a formedon, shall bar the estate tail; for if the issue (without judgment given) aliens the assets, his issue shall recover the land in tail;" but according to Bereford, C.J., it would be otherwise if the assets had been collusively alienated, Y.BB. 4 Ed. II. (S.S.) 67; 8 Ed. II. (S.S.) 137.

a collateral warranty.[1] The latter species of warranty bound the heir even though no assets descended upon him; and in this way the issue might be barred provided that the obligation to warrant descended upon them by a line of descent which differed from the line of descent by which they traced their title to the land. The same reasoning always applied to the case where the obligation to warrant descended upon the remainder-man or reversioner as heir general of the warrantor; in such a case he would be prevented from claiming the land by writ of formedon. But this expedient was uncertain in its operation; and though it might sometimes bar the issue, the reversioner, or the remainder-man, it did not necessarily have this result. Much depended on the manner in which the obligation to warrant on the one side, and right to the entailed land on the other, happened to devolve; and this again depended on the accidents of births and deaths.[2]

An efficacious method of effecting what was desired was at length found in a combination of the doctrine of warranty with the use of a collusive action to recover the land. A brought a writ of right against B, the tenant in tail; B vouched C to warranty. C accepted the duty of warranting the title, and then allowed judgment to go by default. The judgment was that A do recover the land from B, and that B do recover land of equal value from C. The land if recovered from C would have been held by B in the same manner as he held his original estate tail; and thus all parties concerned in the limitations of the original estate tail were compensated.[3] It is not quite certain when this expedient was first invented. Elphinstone thinks that he has come upon it as early as the Y.B. of 14 Edward III.; and the report reads exactly like the report of the proceedings in such an action.[4] Certainly as early as the first year of Henry IV.'s reign

[1] Y.B. 20 Ed. III. (R.S.) ii 202-204; as to this distinction see L.Q.R. vi 283. Elphinstone thus explains it: "Lineal warranty is where the warranty devolves on the person to whom the right to the land passes as heir of the warrantor, so that he has the right to the land as heir, and is the heir on whom the warranty descends. . . . A collateral warranty is a warranty collateral to the title to the land, and is where a man has a right to the land in a different character to that under which the warranty descends to him. For example, if an elder brother tenant in tail discontinue with warranty (i.e. make a feoffment in fee simple with warranty) and die, leaving his brother heir at law and also remainder-man in tail, the warranty is collateral, because the brother is bound to warranty as heir while he takes the land as purchaser;" for examples see Litt. §§ 716, 718; Kendal v. Fox (1628) Cro. Car. 145.

[2] See L.Q.R. vi 282, 283 for an example.

[3] L.Q.R. vi 286. For the forms of the common recovery in later law see Clarke, Students' Precedents in Conveyancing Pt. II. iii.

[4] Y.B. 14 Ed. III. (R.S.) 104, "On a writ of right the tenant vouched to warranty one who came and warranted and afterwards joined in the mise on the better right, and afterwards made default. Wherefore *Hillary* adjudged that the demandant should recover against the tenant, to him and his heirs for ever, quit of the vouchee and of the tenant and of their heirs for ever, and that the tenant should recover over to the value against the vouchee, and that the vouchee should be in

we have a conveyance in tail which contains a clause directed against any attempt to interfere with the descent of the entailed land;[1] Rickhill's settlement, which Littleton criticizes, shows that attempts to interfere with the course of an entail by means of an alienation with warranty were well enough known in Richard II.'s reign;[2] and in the Old Natura Brevium a process of vouching to warranty seems to be hinted at as a mode of barring one's issue.[3] It is obvious from *Taltarum's* or, as it should be written, *Talcarn's* or *Tolcarn's Case*,[4] which, in spite of Coke's authority,[5] is sometimes still said to have given rise to the practice, that in 1472 the common recovery was in full working order.[6] The fact that a recovery was suffered is pleaded as if it were a well-known expedient.[7] The whole argument turned upon its effect under the peculiar circumstances of the case. In Elphinstone's opinion the effect, if any, of *Taltarum's Case* was to make it clear that there were some cases in which a recovery with a single voucher did not suffice, and thus to introduce the recovery with a double voucher of later law.[8] But though we may rightly conclude that the practice of suffering recoveries was in full working order in 1472, we can perhaps gather from Littleton's book that the recovery was in his day regarded rather as a device for evading De Donis[9] than as a "common assurance."[10] Littleton cannot talk,

mercy, etc.;" whether or not this is the report of a merely collusive action, it is clear that the process of vouching and recovery over was well understood, so that the way was prepared for the introduction of the common recovery; cp. also Y.B. 12 Rich. II. 10 *per* Rickhill *arg.*

[1] Madox, Form. no. 736. [2] Litt. §§ 720-723; below 135.

[3] f. 146b, citing a case from Mich. 7 Rich. II.

[4] Y.B. 12 Ed. IV. Mich. pl. 25; for a description of the case and the name corrected from the roll see L.Q.R. xii 301.

[5] Co. Litt. 361b; Mary Portington's Case (1614), 10 Co. Rep. 37b, cited L.Q.R. vi 287.

[6] Dr. Sharpe, Calendar of Hustings Wills i xix, says that upon the Hustings Rolls, "from the very commencement of the reign of Edward IV., or more than ten years before judgment had been given in [Taltarum's Case], fictitious recoveries were constantly enrolled, and a true recovery is only occasionally found."

[7] For the pleadings in the case see note at the end of this section.

[8] L.Q.R. vi 287; the recovery with the single voucher has been described above 118; in the simplest form of recovery with a double voucher, A, tenant in tail, conveyed the land to B, the tenant to the *præcipe*, i.e. the person made tenant for the purpose of having the writ præcipe quod reddat brought against him. C, the demandant, sued B, B vouched A, A vouched the common vouchee; for the reason why a double voucher was sometimes needed see Winchester's Case (1583) 3 Co. Rep. at f. 5b.

[9] See Y.BB. 21 Hy. VI. Hil. pl. 21; 10 Hy. VII. Mich. pl. 28; S.C. 11 Hy. VII. Mich. pl. 25, and 13 Hy. VII. Pasch. pl. 9 for discussions as to whether a condition that tenant in tail should not discontinue was good; in Y.B. 11 Hy. VII. Mich. pl. 25 it was held by all the judges that such a condition was good; above 86 n. 3.

[10] It is repeatedly called a common assurance by Coke, see Pelham's Case (1590) 1 Co. Rep. at f. 15b; Dormer's Case (1593) 5 Co. Rep. at f. 40b; at the same time the procedural details could not be wholly disregarded, see Rowlet's Case (1561) Dyer 188a,

as the judges could talk in Elizabeth's reign,[1] of the right of every man to bar his issue by suffering a recovery; nor can he assert, like a modern writer on the law of real property, that the capacity of an estate tail to be barred is one of its most striking features.

It was only by virtue of a statute of Henry VII.'s reign, a strained construction of that statute, and a statute of Henry VIII.'s reign confirming that construction, that the clause of De Donis which declared that fines levied of such estates should be void, was repealed.[2] Even then a fine did not, like a recovery, bar the reversioners and remainder-men as well as the issue. In other words, it turned the estate tail, not into an estate in fee simple, but into a base fee.

Estates for life, pur autre vie, at will, and at sufferance.[3]

We have seen that it was only by degrees that tenants acquired the right to alienate their land freely. In the days when a man's lord might claim to make his heir "redeem" his land; in the days when the claims of a man's expectant heirs were a serious check upon his powers of disposition, it may well have seemed that an estate for life, or something which resembled it, was all or almost all the interest which any one could have in the land. With the growth of free powers of alienation both as against the lord and as against the heir the position of the tenant for life tended to change. He no longer had the largest interest in the land known to the law. There were others who had existing estates in reversion or remainder. Older rules which went far to put the tenant for life into the position of an owner must be adjusted to the facts of his new position. We can see in the legal position of the tenant for life abundant traces of the older ideas. We can see their modification chiefly in the development of the law as to waste.

From the earliest period in our law the rule has been established that a gift to a man simply gives him only a life estate.[4] Perhaps this shows that at an early period the life estate was the ordinary or normal estate. At any rate the tenant for life represents the land for all purposes of public law and for purposes of litigation. He must be attacked by a claimant to the land; and conversely he has a seisin which entitles him to the protection of the real actions.[5] Being thus seised, he enjoys all the advantages of seisin.[6] It will be seen that this puts enormous powers into

[1] Willion v. Berkeley (1562) Plowden at p. 244.
[2] 4 Henry VII. c. 24; Dyer 3a; 32 Henry VIII. c. 36.
[3] The estate for life of the husband who holds by the curtesy and of the wife who holds in dower are dealt with below, § 9.
[4] Bracton f. 27; Y.B. 15 Ed. III. (R.S.) 322.
[5] P. and M. ii 9, 10. [6] Above 91-92.

his hands. If he is sued it is no doubt his duty to "pray aid" of the other parties interested in the land; but he need not "pray aid;" and if the proceedings are collusive he will certainly not do so. By a collusive recovery he might, before 1285, have deprived a remainder-man of all remedy, and have driven the reversioner to his writ of right. A clause in the Statute of Westminster II. gave the reversioner a writ of entry in such a case.[1] As we have seen, the law did not directly diminish the advantages of the person seised. The tenant for life might still make a tortious feoffment; but in most cases the true owner was given an effective remedy against the alienee.[2]

Already in the days of Bracton it was clear that the tenant for life had a better position than was warranted by the quantity of his interest; and we have seen that by means of the writ of Prohibition relief was given in cases where tenants for life or other limited owners committed waste.[3] The number of cases in Bracton's Note Book upon this topic shows that a more definite rule was needed. Therefore we are not surprised to find that it was dealt with by the Provisions of Westminster;[4] but the clause referred only to tenants for term of years. The Statute of Marlborough (1267) re-enacted this clause of the Provisions of Westminster, and forbade the firmarius to commit waste "nisi specialem inde habuerit concessionem."[5] Other cases were left to the common law. But its rules were still very indefinite. Thus it was not certain that the action would lie against any tenant for life, save the tenant in dower or tenant by the curtesy,[6] unless a royal prohibition against committing waste had been directed to the tenant.[7] The Statute of Gloucester (1278)[8] laid down a general rule, and gave a new remedy. "It is provided," runs the statute, "that a man from henceforth shall have a Writ of Waste in the Chancery against him that holdeth by the law of England or otherwise for term of life or for term of years or a woman in dower. And he which shall be attainted of waste shall lose the thing that he hath wasted, and moreover shall recompense thrice so much as the waste shall be taxed at." Another statute, however, was required to make it plain that this liability was incurred,

[1] 13 Edward I. st. 1 c. 3; above 117 n. 3; Litt. § 481; the remedy was extended to the remainder-man, Litt. loc. cit.; Co. Litt. 280b.

[2] Above 92-93.

[3] Vol. ii 248-249.

[4] § 20 (Sel. Ch. 404), "Item firmarii tempore suarum firmarum vastum vel venditionem vel exilium non faciant de boscis, domibus, hominibus nec de aliis aliquibus ad tenementa quæ ad firmam habuerint spectantibus, nisi specialem habeant concessionem per scripturam suæ conventionis mentionem habentis quod hoc facere possint. Et si fecerint, et de hoc convincantur, damna plene refundant."

[5] 52 Henry III. c. 23.

[6] Co. Litt. 53b, 54a; Second Instit. 145, 299.

[7] Bracton f. 315.

[8] 6 Edward I. c. 5.

even though no royal prohibition had been directed to the tenant guilty of making waste.[1] In 1292 the right to sue for waste was extended to the heir of the reversioner;[2] and in 1433 the penalties for waste were extended to tenants for life who held an equitable estate.[3] Magna Carta had provided that the guardian in chivalry who wasted the land should lose the wardship.[4] The Statute of Gloucester[5] made the writ of waste given by the statute available in such a case. After some hesitation it was held that this writ was not available where a guardian in socage[6] or a bailiff[7] committed waste. The proper remedy in these cases was the action of account.

The Year Books contain many decisions upon the effect of these enactments.[8] These decisions are the basis of the modern law upon this subject. It was very early settled that the waste must be committed by the voluntary act of the tenant. The fact that the damage had occurred accidentally or that it had been occasioned by *vis major* was a good defence;[9] and Bereford, C.J., once ruled that the damage done must not be too trivial.[10] On similar principles it was held in Edward III.'s reign that the tenant was not liable for waste occasioned, not by his own acts, but by the defective condition of the property demised.[11] How far the tenant was liable if he simply permitted the premises to decay was not then and has never yet been quite clearly settled.[12] The fact that positive acts of destruction are usually alleged would seem perhaps to indicate that the law was inclining to the view that he was not liable for merely permissive waste; and this, as we shall see,[13] was in accordance with the prevailing mediæval view that liability was based on a positive act contrary to law which caused damage. It was, however, settled at the

[1] 13 Edward I. st. 1 c. 14.

[2] 20 Edward I. st. 2. The statute was made in consequence of the doubts of the judges upon this question; the case in which these doubts arose is recited in the statute by way of preamble.

[3] 11 Henry VI. c. 5. [4] (1225) § 4. [5] 6 Edward I. c. 5.

[6] Y.B. 2, 3 Ed. II. (S.S.) 35 the matter was treated as doubtful; Y.B. 16 Ed. III. (R.S.) i 50-54 it was held that the proper remedy was account; Co. Litt. 54a.

[7] Y.B. 3, 4 Ed. II. (S.S.) 136.

[8] For illustrations of the various kinds of waste alleged see Y.BB. 32, 33 Ed. I. (R.S.) 112; 17, 18 Ed. III. (R.S.) 338; 20 Ed. III. (R.S.) i 402-412.

[9] Y.BB. 21, 22 Ed. I. (R.S.) 30; 30, 31 Ed. I. (R.S.) 480.

[10] "It would be fine law were we to rule the abatement of a house worth twelve pence to be waste in a messuage, and of a couple of apple trees worth sixpence to be waste in a garden. We will not do it," Y.B. 5 Ed. II. (S.S.) (1312) 247.

[11] Y.B. 29 Ed. III. Pasch. p. 33.

[12] Y.B. 18 Ed. III. (R.S.) 42, "Note that *Moubray* in order to delay judgment touched firstly the point that it had not been found that the tenants committed waste . . . and also that in the houses waste was not found, but want of roofing"—the point was not decided, as the tenant agreed to accept the verdict of the jury finding waste.

[13] Below 375-377.

end of this period that the tenant for years must keep the property in repair;[1] but that, in the absence of an express contract, the tenant for life or years was not liable for not rebuilding a house let in a ruinous condition.[2] We shall see that Coke laid it down that both lessees for years and for life were liable for merely permissive waste;[3] and that, though his statement fixed the law for some time, later decisions have rendered the question of the liability of tenants for life and years for permissive waste somewhat more doubtful.

There is a clear decision in Edward III.'s reign that acts which improve the value of the property cannot be considered to be waste—that there can be no such thing as "ameliorating waste."[4] Later decisions, however, make it clear that acts which improve the property only from the tenant's point of view may be waste if they injure the interest of the reversioner.[5] It is clear from the terms of the Statute of Marlborough that the landlord or the reversioner could always permit waste.[6] From very early times there have been tenants for life "without impeachment of waste."[7]

The tenant for life was entitled to take reasonable "botes" and "estovers" without committing waste—he could cut underwood for firing or timber trees for the repair of the house.[8] But he could not cut timber trees for any other purpose.[9]

The tenant for life could always alienate his estate for the term of his life. Thus was created the *Estate pur autre vie.*[10] As to the exact nature of this estate the law never quite made up its mind. Even in modern law it hovers uncertainly upon the borders of realty and personalty. In the thirteenth century it was regarded as a chattel interest, like the term of years.[11] If undisposed of by will it reverted to the donor.[12] In Edward I.'s day, however, it was beginning to be regarded as a freehold;[13] but whether it was chattel real or freehold was then an open

[1] Litt. § 71.

[2] Y.BB. 22 Hy. VI. Mich. pl. 34; Longo Quinto 100; 10 Hy. VII. Mich. pl. 3, "Fuit tenu per touts les justices, si jeo lesse une meason a terme de vie ou d'ans, si la meason ne soit couvre al temps del lease fait, le lessee n'est tenu a ce couvre; et aussi si la meason fuit ruinous al temps del lease fait, ce sera bon matier pur le termor a ce mettre en un brief de waste."

[3] Bk. iv Pt. II. c. 1 § 7.

[4] Y.B. 14 Ed. III. (R.S.) 170; for later rules see Maleverer v. Spinke (1538) Dyer at f. 36b; Co. Litt. 53a; the rules there laid down seem to be the foundation of the view that acts which improve the value of the property may be waste.

[5] See Bk. iv Pt. II. c. 1 § 7. [6] Above 121.

[7] Y.BB. 12, 13 Ed. III. (R.S.) 166; 18, 19 Ed. III. (R.S.) 540.

[8] Y.BB. 11, 12 Ed. III. (R.S.) 486; 21 Hy. VI. Pasch. pl. 23.

[9] Y.BB. 20, 21 Ed. I. (R.S.) 166; 11, 12 Ed. III. (R.S.) 446, 448; 20 Ed. III. (R.S.) i 402-412.

[10] Madox, Form. no. 197.

[11] Bracton f. 13. [12] Ibid 26b, 27a.

[13] Hengham, Parva c. 5, cited P. and M. ii 81 n. 1.

question[1]—in 1313 it was said in argument that "the law doth not suffer a man to make a freehold for the term of the life of another."[2] But it would appear from the annotator of Britton and from the Old Tenures that it was settled in the fourteenth century that the tenant pur autre vie had a freehold.[3] Whether a lessor, tenant in fee, who created such a tenancy could hold his tenant liable for waste was doubted in Edward III.'s reign.[4] It was settled when Littleton wrote that he was liable for waste.[5]

Being freehold the estate could not be devised; and what was to happen if the tenant pur autre vie died in the life of the cestui que vie, the lawyers of the fourteenth and fifteenth centuries could not satisfactorily decide. In 1343 a fine was refused because it was so limited that no provision was made for this possible contingency; and it was only admitted when the heir of the tenant pur autre vie was inserted in the limitation.[6] The difficulty was a logical difficulty which specially appealed to the lawyers of this period. If A, tenant for life, grants his life estate to B for his (A's) life, and if B dies in the life of A, who will take the land? Not A, because he has disposed of his whole interest, and not B's heirs, both because they have not been named and because the estate is not an estate of inheritance. The only conclusion we can come to is the conclusion of the reporter in a Year Book of Henry VI.'s reign, that the estate "occupanti conceditur."[7] The estate goes to the first taker—the general occupant. It was perhaps by analogy to this doctrine of general occupancy that the title "special occupant" was, at the end of the sixteenth century,[8] applied to the case where, the grant being to A and his heirs pur autre vie, A's heir succeeds on his death. A's heir takes, not as heir, because the estate is not an estate of inheritance, but as occupant.[9] Later statutes,[10]

[1] Y.B. 2, 3 Ed. II. (S.S.) 197. [2] Y.B. 6, 7 Ed. II. (S.S.) 196 *per* Hedon *arg.*

[3] Britton ii 124 n. *c*; Old Tenures 90.

[4] Y.B. 14 Ed. III. (R.S.) 158. [5] Litt. § 57; Co. Litt. 41b.

[6] Y.B. 17, 18 Ed. III. (R.S.) 76, "Humphrey de Bassynburne grants and renders the tenements, etc., to A and B for the whole of Humphrey's life, so that after Humphrey's decease the tenements shall remain over. *Shardelowe*, J.—The fine must be final, and limited in certain persons with whom the land will abide: and suppose the two died during Humphrey's life, who would have the land? *Thorpe*.—The heirs of him who should survive for the time. . . . And afterwards he made the render to the two, and the heirs of one of them, for the life of Humphrey."

[7] Y.B. 38 Hy. VI. Pasch. pl. 9; Y.B. 19 Hy. VI. Mich. pl. 49 Paston seems to regard it as a freehold while the cestui que vie lives, but if the tenant holds over it is a chattel interest.

[8] See L.Q.R. xxxii 399, where it is pointed out that though the special occupant was known to Coke, he was not known to Littleton or Perkins.

[9] Co. Litt. 41b; Challis, Real Property 327, 328.

[10] 29 Charles II. c. 3 § 12; 14 George II. c. 20 § 9; 1 Victoria c. 26 § 2 (the Wills Act).

which have been passed to abolish the doctrine of general occupancy by vesting the estate in the personal representative, have given to this estate its double character in modern law. If it vests in them under these statutes it is administered as personalty: if it vests in the heir as special occupant it is administered as realty.

As we have seen, *the estate of the tenant at will* is recognized by Littleton.[1] In the thirteenth century such an interest in land would hardly have been classified as an estate. Most estates held at the will of the lord were estates held by unfree tenure. If there was no question of unfree tenure it would appear from Fleta that the law regarded it as a kind of servitude analogous to usufruct or habitatio.[2] It is recognized as an estate at the end of this period; and it is in connection with this kind of estate that Littleton introduces the law as to emblements. "If the lessee soweth the land, and the lessor after it is sown, and before the corn is ripe, put him out, yet the lessee shall have the corn, and shall have free entry, egress, and regress to cut and carry away the corn, because he knew not at what time the lessor would enter upon him. Otherwise it is if tenant for years, which knoweth the end of his term, doth sow the land."[3] The principle of this rule had been applied, as Coke said, and as the authorities cited by him show, to "every particular tenant that hath an estate incertain."[4] The statutes relating to waste did not apply to the tenant at will, but the landlord could bring trespass if voluntary waste were committed.[5]

A tenancy at sufferance arises where "he that at the first came in by lawful demise and after his estate ended continued the possession and wrongfully holdeth over."[6] It is not an estate, "for in judgment of law he hath but a bare possession."[7] Such a person is not a disseisor; and a lessor could not bring trespass against him before he (the lessor) had entered on the property.[8] It was with a view to enable the landlord to recover his land in these circumstances that some of the earliest of the writs of entry were invented.[9]

[1] §§ 68-72; vol. ii 579.

[2] 3. 15. 3, "Ut si quis sine scripto concesserit alicui habitationem vel usumfructum in re sua tenendi ad voluntatem suam, hæc quidem possessio est precaria et nuda; eo quod tempestive et intempestive pro voluntate domini poterit revocari, velut de servis in villenagio."

[3] § 68; the question whether the termor had a right to emblements was doubtful in 1310-11, but opinion was inclining to the rule ultimately reached, see the reporter's note Y.B. 4 Ed. II. (S.S.) 133. On similar principles the tenant at will of a house had free entry to take away his goods in the house after the end of the tenancy, Litt. § 69.

[4] Co. Litt. 55b; 10 Ass. pl. 6; Y.BB. 18, 19 Ed. III. (R.S.) 466; 7 Hy. IV. Trin. pl. 15.

[5] Co. Litt. 57a (§ 71).

[6] Ibid 57b.

[7] Ibid.

[8] Ibid.

[9] Above 12.

Co-ownership.

The law of the fifteenth century knew four kinds of estate held in co-ownership—joint tenancy, coparcenary, tenancy by entireties, and tenancy in common.[1] Each has its peculiar features. The estate of the joint tenant cannot be partitioned unless all the joint tenants consent.[2] They are seised "per my et per tout;" so that a writ against joint tenants will not abate by the death of one of them;[3] and if one joint tenant wishes to convey his share to the other or others he must do so by release. The estate is distinguished by four unities—the joint tenants must get their estate by the same title, they must begin to enjoy it at the same time, they must take the same interest, they have the same possession. If one dies the other or others take by survivorship—*jus accrescendi præfertur oneribus.* Coparcenary occurs when several take as co-heirs. Coparceners can compel partition by an appropriate writ of partition. They convey to one another either by feoffment with livery of seisin or by release. There is no right of survivorship. Each coparcener's share descends to her heirs. Tenancy by entireties can only exist where an estate is given to husband and wife. During their marriage husband and wife are one person in law; and an estate so given must come to the wife (unless it has been conveyed away by fine), notwithstanding any alienation or forfeiture incurred by the husband. Tenancy in common is distinguished by unity of possession only. "A tenancy in common, though it is an ownership only of an undivided share, is, for all practical purposes, a sole and several tenancy or ownership; and each tenant in common stands, towards his own undivided share, in the same relation that, if he were sole owner of the whole, he would bear towards the whole. And accordingly one tenant in common must convey his share to another, by some assurance which is proper to convey an undivided hereditament; and he cannot so convey by release."[4]

It was only gradually that these four distinct species of estate were evolved. Bracton recognizes coparcenary,[5] joint tenancy where the tenants are seised "per my et per tout,"[6] and perhaps

[1] Litt. §§ 277-324.

[2] See Y.B. 19 Ed. III. (R.S.) 12, 14, for a quaint tale about a partition.

[3] "But in a case of parcenary such a death will abate the writ. And the reason is that in a case of parcenary the estate of each tenant is changed by the accretion of his share of the estate of a parcener that dies, whereas in a case of joint feoffment the estate of the tenant is not changed, seeing that each of them is tenant of the whole," the Eyre of Kent (S.S.) ii 84.

[4] Challis, Real Property 336, 337; and on the subject generally see ibid 332-346.

[5] f. 72.

[6] f. 13; Britton i 232, 233; Y.B. 4 Ed. II. (S.S.) 52 *per* Bereford, C.J.

tenancy by entireties.[1] It is clear that in his day the incident of survivorship was already a characteristic of joint tenancy; and it had already occurred to some that it might be used to defeat the lord's claim to relief or wardship.[2] It would appear that Britton thought that this incident was not peculiar to the estate of the joint tenant. He ascribes it also to the estate of the coparcener.[3] But it would appear that as early as 1312 it was recognized that "in case of parcenary, each parcener hath a several right;"[4] and that in 1340 it was recognized that the estate of the coparcener was not subject to the incident of survivorship.[5] In Bracton's day it had already been distinguished from the estate of the joint tenant by the fact that each coparcener had the writ of partition, whereas there could be no partition between joint tenants without their mutual consent.[6] The estate of the joint tenant has thus come to be distinguished from the estate of the coparcener by three leading differences—the several rights of the parceners, survivorship, and partition.

As early as Edward I.'s reign the distinction between joint tenancy and tenancy in common was becoming apparent.[7] In fact, it was bound to emerge when a partition was made and the tenants continued to live together on the land. In 1304 it was decided that in such a case there could be no survivorship—to have decided otherwise would have prejudiced the lord.[8] The distinction between joint tenancy and tenancy in common was emphasized by Parning in 1340;[9] and in 1365 Knyvet said,[10] "If a remainder be limited to two in tail, he who survives will have the whole interest . . . and the heirs will never have several actions, unless their titles begin from several rights; as if two

[1] f. 208, "Item tenementorum aliud proprium et alicujus per se sine participe vel sine adjuncto, aliud non per se, sed cum adjuncto et participe. Cum adjuncto, ut si vir cum uxore . . . qui non dicuntur participes quia jura eorum et res divisionem non accipiunt; sunt enim una caro, quamvis animæ diversæ."

[2] P. and M. ii 20 n. 2.

[3] ii 73, 315, 316; at p. 73 it is said that there is no inheriting between parceners —the share of one accrues to the other; and this is so even after partition if one die without heir of the body. The annotator of MS. *N* denies this and states the later rule; and cp. a case of 1304, below n. 8.

[4] Y.B. 5 Ed. II. (S.S.) 1312, 116 *per* Stanton, J., but see above 126 n. 3. for the older view.

[5] Y.BB. 14, 15 Ed. III. (R.S.) 34; cp. 17, 18 Ed. III. (R.S.) 174.

[6] ff. 72 seqq., 443b; Britton ii 65-73; Y.B. 30, 31 Ed. I. (R.S.) 324. The writ of partition was not extended to joint tenants till 31 Henry VIII. c. 1.

[7] Terms are not, of course, used in their later precise meaning, see Y.B. 2, 3 Ed. II. (S.S.) 144.

[8] Y.B. 32, 33 Ed. I. (R.S.) 152, "*Bereford*, J.—After the partition made as you say, cannot they again hold jointly as they did before? *Royston*.—The law does not allow it; it would prejudice the lord: for if two persons enfeoffed jointly in fee simple make partition between them, one portion will sooner escheat to the chief lord than survive to the other joint feoffee;" in Y.B. 6, 7 Ed. II. (S.S.) 86 Bereford, C.J., seems to have adhered to his view which was not the view which prevailed.

[9] Y.B. 14 Ed. III. (R.S.) 198, 200. [10] Y.B. 38 Ed. III. Mich. p. 26b.

parceners alien certain land, reserving to themselves a certain rent, the heirs of either will inherit, because their rights in the land are several. But when their right is by purchase the inheritance will never be several." It is clear that the several rights of the tenants in common and of coparceners are distinct from the joint rights of joint tenants.

We can see from a case of the same reign, cited by Coke,[1] that the distinguishing characteristic of tenancy by entireties was known to the law. Even the treason of the husband did not bar the wife's right to the land.

By Edward III's reign, therefore, the law had reached the four types of co-ownership. All that was wanted was the expression of the differences between these types by apt terms. It may be that Littleton's book had something to do with fixing the final form of the terms used to express these different types.

Estates created to secure money lent; tenancies by Elegit Statute Merchant, and Statute Staple.

We have seen that the ordinary common law form of mortgage was settled in its final form when Littleton wrote.[2] We must now trace the process by which this form was reached, and examine the reason why this particular form—a feoffment defeasible upon condition subsequent—was adopted.

The giving of land as a security for a debt was well known to early law—we see it in Domesday Book;[3] and the machinery adopted for effecting this purpose was very various. In Glanvil's day we can lay down two general rules: (1) The mortgagee is always in possession. A mere agreement that property shall be security for a debt is not recognized by the king's court.[4] (2) The transaction might be either *mortuum vadium* or *vivum vadium*. In the former case the profits of the land did not go in reduction of the debt; and, though a creditor who made this bargain fell into the sin of usury, it was not prohibited by the law. In the latter case the profits went in reduction of the debt, and it was considered to be a fair and honourable bargain.[5] Subject to these two rules the machinery adopted by the parties to carry out their

[1] Co. Litt. 187a (§ 291) citing the case of William Ocle and Joan his wife; Mich. 33 Ed. III. Coram Rege Salop. in Thesaur.; cp. Y.B. 39 Hy. VI. Hil. pl. 8 ad fin.—a dictum of the court which shows that the estate was known in its modern shape; see Greneley's Case (1610) 8 Co. Rep. 71b.

[2] Vol. ii 579. See on the whole subject two articles by Professor Hazeltine, H.L.R. xvii 549, xviii 36.

[3] P. and M. ii 118 n. 1, citing D.B. ii 137, 141, 217. [4] Glanvil x 8.

[5] Ibid x 6 and 8. Glanvil and Littleton give different explanations of the term "mortgage;" according to Glanvil the gage is "dead" when its profits are not working off the debt and interest; according to Littleton (§ 332) the gage is "dead" to the debtor if the debt is not paid to date; as we shall see, these different explanations are suited to the state of the law at the periods when they were given.

intentions might vary. If the land was conveyed to the creditor for a fixed term, the parties might agree that, in default of payment on the day, the land should belong to the creditor; but, if this agreement had not been made, the creditor must, at the fixed day, come to the court, and get an order to pay, and a declaration that, in default of payment, the land should belong to him.[1] If the land was not conveyed to the creditor for a fixed term he could at any time go to the court and get an order to pay, and a declaration that, in default of payment, the land should belong to him.[2] The great defect of these arrangements from the debtor's point of view lay in the fact that he lost possession, from the creditor's point of view in the fact that his possession was not protected by the assizes. If ejected, even by the mortgagor, he could not recover the land.[3] It was probably due chiefly to the latter cause that the peculiar interest of the mortgagee, as defined by Glanvil, disappeared. He ceased to take a peculiar interest as mortgagee, and took instead some one of the recognized estates or interests in the land—a fee simple, a life estate, or a term.

During the period from the thirteenth to the fifteenth century we can distinguish three different methods of effecting a mortgage. (1) The debtor might give the creditor a lease at a nominal rent. The rents and profits of the land paid off the debt, and provided interest for the creditor, without the suspicion of committing the sin of usury.[4] (2) The debtor might convey the land to the creditor for a term of years, with a proviso that if the debt be not paid at the end of the term the creditor shall keep the land in fee.[5] (3) The debtor might convey the land to the creditor in fee, with a proviso that if the debt was paid by a fixed date the land should be reconveyed;[6] and this condition was strictly construed. Britton distinctly denies that there can be any equity of

[1] Glanvil x 6, and 8, "Preterea cum ad certum terminum res aliqua ponatur in vadium, aut ita convenit inter creditorem et debitorem, quod si ad terminum illum vadium suum non acquietaverit debitor ipse; tunc vadium ipsum remanebit ipsi creditori, ita quod negotium suum sicut de suo inde faciat;" if there is no such agreement, when the term expires the creditor summons the debtor, and, if the debtor admits liability, "precipietur ei quod ad rationabile terminum vadium ipse acquietet, et nisi fecerit, dabitur licentia ipsi creditori, de cetero negotium suum de vadio ipso, sicut de propria re, facere quovis modo voluerit."

[2] Ibid. "Si vero non ad aliquem terminum sed sine termino res aliqua invadiatur, quocunque tempore voluerit creditor, debitum petere potest."

[3] Ibid x 11, "Creditor siquidem a seisina sua ceciderit per debitorem vel per alium, nullam inde seisinam per curiam recuperabit, nec etiam per recognitionem de nova disseisina."

[4] P. and M. ii 121, and Bracton's Note Book cases 50 and 370 there cited.

[5] Bracton f. 20; Britton ii 125, 126; Y.BB. 21, 22 Ed. I. (R.S.) 125, 222; 6 Ed. II. (S.S.) i 57; 8 Ed. II. (S.S.) 35-36; Madox, Form. no. 509; 12 Ass. pl. 5; cp. 1. 2 Ed. II. (S.S.) 63 and n. The conveyance might possibly be for life, see Y.B. 12 Rich. II. 47 *per* Hill *arg.*; or till the day of payment, Y.B. 6 Ed. II. (S.S.) 235.

[6] Bracton's Note Book case 458; Y.BB. 30, 31 Ed. I. (R.S.) 210, 266; 8 Ed. II. (S.S.) 37; 11, 12 Ed. III. (R.S.) 373; 13, 14 Ed. III. (R.S.) 122.

redemption.[1] Both the two last forms were known to Littleton;[2] but it is the third form which ultimately prevailed. It gained in popularity from the fourteenth century onwards;[3] and, when the rules as to the creation of future estates in the land became more definitely fixed, the lawyers began to think that the second form of mortgage, according to which a term of years swells into a fee by the happening of an event, is legally impossible.[4] Just as the rules of the king's courts as to the kinds of seisin protected by the assizes destroyed the twelfth-century estate in mortgage, so the later rules of the common law as to the modes in which the estates of which men could be seised might be manipulated, limited to one type the interest of the mortgagee. He took an estate defeasible upon condition subsequent. His estate was, it is true, only a security for money lent. This fact was recognized in Edward II.'s reign;[5] and, as we have seen, it was recognized also by Littleton.[6] But, as a result of the strictness with which such conditions were construed, this feature of his estate was obscured till the court of Chancery began to erect the elaborate superstructure of our present law of mortgage upon the basis provided by the mediæval common law.[7] The narrowness of this basis has necessitated the elaboration of the superstructure, and has caused the consequent complication of the law. That the basis was so narrow was due in part to the hasty generalizations of the lawyers of the thirteenth century, in part to the technical doctrines of the lawyers of the succeeding three centuries.

Before the Jews were expelled from England[8] a different form

[1] ii 128, "And if the plaintiffs say that equity ought to assist them on account of the smallness of the debt [i.e. when they have not paid on the day], that shall not avail them, since every freeman may dispose of his property at his will without doing any wrong to his heirs."

[2] §§ 332, 349.

[3] This fact can be illustrated from the forms of conveyance printed in Madox, Form. In 1255 (no. 230) we have a mortgage of the older type made by a lease for fifteen years. In Edward III.'s reign the custom seems to have been to employ two deeds. A feoffment in fee was made; and then by another deed it was agreed that if the money was paid within a specified time the feoffment should be void; if it was not paid the land was to belong to the feoffee and his heirs (nos. 560, 561, 562). In 1401 only one deed is used, and the condition is indorsed on the deed (no. 579). 19 Hy. VI. we get a mortgage in the modern form (no. 589).

[4] P. and M. ii 122; formerly such arrangements had been common enough, both for the purpose of a mortgage and otherwise, Madox, Form. nos. 514, 538; Plessington's Case (1383) Bellewe 101-102.

[5] "When a man pledges tenements his intention is not to grant an estate of inheritance, but to give security for the repayment of the money he has borrowed and to redeem the tenements; and in such case, if he repay the money he can enter," the Eyre of Kent (S.S.) iii 85 *per* Spigurnel, J.; for this case see ibid Introd. xxi.

[6] Vol. ii 579 n. 10.

[7] There is an application of a mortgagor to the Chancellor as early as 1456, Select Cases in Chancery (S.S.) 137-139; for the later equitable developments see Bk. iv. Pt. I. cc. 4 and 8.

[8] For the position of the Jew see vol. i 45-46.

of mortgage was recognized by the Jewish Exchequer. "The Jewish gagee was not always in possession, and it seems possible that under the system of registration which had been introduced in Richard's reign a valid gage could be given to him, though the gagor never went out of possession for a moment."[1] On default he could get possession of the lands, and, after a year's possession, sell them or hold them himself, or demise them to another till the debt was paid out of the rents and profits.[2] As Maitland points out, if the Jews had not been expelled the common law might have come by a simpler form of mortgage than the conditional feoffment.[3] However this may be, it is not improbable that the legislature borrowed some ideas from the laws of the Jewry when it gave the judgment creditor a right to take possession of his debtor's lands by a writ of *Elegit*.[4] It was enacted in 1285[5] that "when debt is recovered or acknowledged in the king's court, or damages awarded, it shall henceforth be in the election of him that sueth for such debt or damages to have a writ of *fieri facias* unto the sheriff for to levy the debt from the lands and goods; or that the sheriff shall deliver to him all the chattels of the debtor (saving only his oxen and the beasts of his plough) and the one half his land upon a reasonable price or extent." The creditor held the land till the debt was paid.[6] His interest was a chattel interest;[7] but by the express provision of the statute he was allowed to recover by the assize of novel disseisin. Another statute of the same year gave a similar remedy to merchant creditors.[8] The creditor could summon his debtor "before the mayor of London or before some chief warden of a city or of another good town where the king shall appoint." The debt being acknowledged before them, and a time of payment fixed, the

[1] P. and M. ii 122.

[2] Select Pleas of the Jewish Exchequer (S.S.) xiii; ibid 2 (Charter of John); ibid 100, 101 (plaintiffs put in seisin of lands gaged till debt be paid); Calendar of Plea Rolls of the Exchequer of the Jews i 158, 173, 227 (cases of demise). These practices led to frequent actions being brought for account, see e.g. Calendar, etc. i 7, 8.

[3] P. and M. ii 123.

[4] Ibid i 457, 458.

[5] 13 Edward I. st. 1 c. 18; cp. a roll of 3, 4 Ed. I. cited Madox, Exch. i 247, and P. and M. i 458, to the effect that, "according to the assize and statutes of the king's Jewry, his Jews ought to have one moiety of the lands, rents, and chattels of their Christian debtors until they shall have received their debts;" L.Q.R. xviii 307.

[6] Y.B. 30, 31 Ed. I. (R.S.) 440; Y.B. 15 Ed. III. (R.S.) 326—a term being a chattel cannot be delivered in execution under this writ.

[7] Co. Litt. 43b; and the tenants by Statute Merchant and Staple also had chattel interests, ibid.; Y.B. 2, 3 Ed. II. (S.S.) 67, 68 *Inge*, J.A., "Properly speaking [the estate given by the statute] is not the freehold, for the creditor has nothing but a term of years, though he holds in the name of freehold by the form of the statute;" but note that in 1311 Stanton, J., ruled that "holding by Statute Merchant is not holding for a term of years but is frank tenement," Y.B. 4 Ed. II. (S.S.) 183—a view which was not followed.

[8] 13 Edward I. st. 3.

creditor could, if the debtor did not pay at the time so fixed, make another application to the court. The court could then commit the debtor to prison. Within three months the debtor could sell his land to pay his debt; but if at the end of that time it was not paid, all the lands and goods of the debtor were delivered to the creditor. The creditor who had thus got the land was substantially in the some position as the tenant by Elegit.[1] Similar provisions were made in 1353 by the Statute of the Staple in the case of debts acknowledged before the staple court.[2] These remedies bound the land in the case of Elegit from the date of judgment; in the case of Statutes Merchant and Staple from the recognizance.[3]

Estates in Expectancy

The two species of estates in expectancy known to the mediæval common law were the reversion and the remainder.[4]

The term "revert" has been used from the earliest times both in this country and elsewhere to signify what will happen when an estate for life expires. The land *revertit* or *redit* to the grantor. The natural contrast to *revertit* or *redit* is *remanet*. The land, instead of returning, remains away from the grantor.[5] We get, as we have seen, the terms "reversion" and "remainder" in Edward I.'s reign, and, somewhat later, the terms "reversioner" and "remainder-man."[6] In later days the derivation of the terms "reversion" and "remainder" became obscured. It came to be thought that these interests in land were so called because they were estates left over after a smaller estate had been carved out of a greater estate. "A reversion is where the residue of the estate always doth continue in him that made the particular estate."[7] A remainder is a "remnant of an estate in lands or tenements expectant upon a particular estate created together

[1] For various small differences between tenant by Elegit on the one hand, and tenant by Statute Merchant or Staple on the other, see Y.B. 15 Hy. VII. Mich. pl. 6. For the forms see App. V.

[2] 27 Edward III. st. 2 c. 9; for this court see vol. i 542-543.

[3] Digby, History of the Law of Real Property (4th ed.) 280, 281.

[4] For rights of entry for condition broken, and possibilities of reverter, which are future interests, but not estates in the land, see Gray, Perpetuities (2nd ed.) 6-7; Challis, Real Property (3rd ed.) 82-84; as Coke points out, Co. Litt. 22a-b, the effect of De Donis was to convert the possibility of reverter, which the donor of a conditional fee had at common law, into a reversion; cp. Plowden at p. 247.

[5] P. and M. ii 21; it is there pointed out that the term *revertit* is thus used in the A.-S. land book; that we find the term *remanet* used in this sense on the Continent; and that the two terms are contrasted in this way in a passage of Ulpian's Fragments.

[6] Vol. ii 350, 351.

[7] Co. Litt. 22b; it is clear from Wrotesley v. Adams (1558) Plowden at p. 196 that the judges had adopted the new definition, though they still remembered the old.

with the same at one time."[1] But, as Maitland points out,[2] "if we look at the documents of the thirteenth century, we soon see that the word *remanere* did not express any such notion of deduction or subtraction. The regular phrase is that, after the death of A, or if A shall die without an heir of his body, then the said land . . . shall remain to B, that is, shall await, shall abide for, shall stand over for, shall continue for B." The later erroneous derivation of these terms was perhaps a natural consequence of regarding these future interests as present existing estates in the land. The common law theory of estates gave a reality—a corporeal character—to that abstract thing, the interest of the tenant in fee simple, and therefore to the various smaller interests, whether in possession or expectancy, which he could create out of his larger interest.[3] The modern definitions given by Challis[4] of the reversion and the remainder were the definitions substantially reached in the fourteenth century.

The Reversion.

We have seen that it was not until after the passing of the statute Quia Emptores[5] that the title of the reversioner became distinct from the title of the lord who takes by escheat. After the passing of that statute, if a tenant in fee simple dies without heirs, his land escheats to the lord of whom it is held; and that lord is not the donor unless the tenant has taken the land by grant from the crown. If, on the other hand, the interest of a tenant for a smaller estate expires the land reverts to the donor who gave the estate, and of whom the estate is held. The statute therefore differentiated the reversion from the right of the lord to take by escheat, and brought it clearly into view as a distinct estate. The right to escheat depends upon tenure, and upon tenure alone—the land goes back to the lord of whom it is held. This right is not an estate—it is a mere possibility that an estate will arise. The reversion depends also on tenure—the smaller estate is held of the donor; but it is more intimately related to the quantum of estate taken by the tenant, and it is itself an estate in the land. When the tenant's estate expires the donor's estate in expectancy becomes an estate in possession.

[1] Co. Litt. 143a. [2] L.Q.R. vi 25.

[3] Vol. ii 350-352; cp. Challis, Real Property 73 note, "Although it would be historically and etymologically incorrect to regard the word 'remainder' as signifying what is left over when the particular estate has been subtracted, yet the doctrine of the relative *quantum* of estates has been now for several centuries firmly established in English law; and it is quite usual and not improper to speak of a particular estate, or several successive estates, as having been carved or derived out of an original estate."

[4] Challis, Real Property 68. [5] Above 68.

The Remainder.

In modern law remainders are either vested or contingent. The distinction between them is clearly pointed out in Fearne's well-known definition.[1] "It is not the uncertainty of ever taking effect in possession that makes a remainder contingent; for to that every remainder for life or in tail is and must be liable; as the remainder-man may die, or die without issue, before the death of the tenant for life. The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent."

We have seen that in the days before the various interests in the land were stereotyped within the limits of certain classes of estates, interests which answered to the description of the contingent remainder of later law were created.[2] As soon as the estates in the land known to the law became fixed, the possibility of creating such contingent interests began to be questioned, on the ground that, pending the contingency, there was no one in whom the seisin could vest. In 1304[3] we have the following note: "A man acknowledged tenements to be the right of another as that which he had of his gift; and for that acknowledgment the other granted and rendered the same tenements to the aforesaid man and his wife to have and to hold to them and to the heirs of their bodies begotten, and if they died, etc., that the tenements should remain to the right heirs of the man—this, however, is strange, seeing that the remainder was not granted to any certain person." In 1304 the rule in *Shelley's Case* was hardly known.[4] By virtue of that rule limitations of this kind to the heirs of a donee were valid, because the gift was construed as a gift to the donee, and not to his heirs. But we can see that the reporter has hit upon the objection which will prove fatal to the contingent remainder. A remainder limited to the heirs of a living person is contingent because till that person dies his heirs cannot be ascertained. As we have seen, Stonore, C.J., took this point in 1324.[5] In 1337 a remainder to named persons not in esse at the time of the gift was assumed to be bad;[6] and cases of Henry IV. and Richard II.'s reigns show that this was the law of the fourteenth century.[7]

[1] Fearne, Contingent Remainders (9th ed.) 216.
[2] Above 104.
[3] Y.B. 32, 33 Ed. I. (R.S.) 328.
[4] Above 107, 108.
[5] Above 108 n. 2.
[6] Y.B. 10 Ed. III. Mich. pl. 8 *per* Parning.
[7] Y.B. 11 Hy. IV. Trin. pl. 14, "Terre hors de ma personne ne puit my passer in *nubibus*" *per* Thirning and Hill; Fitz., Ab. *Detinue* (P. 2 R. II.) pl. 46.

The four sections of Littleton's book in which he deals with the reasons why a settlement made by Rickhill, J., in Richard II.'s reign could not take effect, show that Littleton must have regarded such remainders as invalid.[1] Rickhill had settled his land on his eldest son and the heirs of his body, remainder in default of issue to his second son and the heirs of his body, and similarly to his other sons and the heirs of their bodies in succession. Then, with a view of preventing any interference with this settlement, he provided that, if any of his sons aliened or made warranty to bar the remainders, their estate should cease and should remain to the son next entitled.[2] Littleton explains that this settlement was invalid for three reasons: Firstly, because "every remainder which beginneth by a deed it behoveth that the remainder be in him to whom the remainder is entailed by force of the same deed before the livery of seisin is made to him which shall have the freehold, for in such case the growing and being of the remainder is by the livery of seisin to him that shall have the freehold, and such remainder was not to the second son at the time of the livery of seisin in the case aforesaid."[3] Secondly, because, to use modern terms, it broke the rule that a remainder must wait for the regular ending of the precedent estate. Here was an attempt to make a remainder begin upon an arbitrary event—a discontinuance by the tenant in tail; upon an event, moreover, which gave the discontinuee a fee simple.[4] Thirdly, because it was an attempt to break the rule that the benefit of a condition or a right of entry can be limited only to the donor or his heirs.[5] Littleton's examination of Rickhill's settlement was, as we shall see, found extremely useful by the courts when, during the latter half of the sixteenth century, they began their long struggle against the creation of perpetuities. At this point it is only necessary to say that it shows that, without some modification of the first of the rules for the limitation of estates which is there stated, contingent remainders would have been legally impossible.

It was not till Henry VI.'s reign that any relaxation of the rule was allowed. In 1430[6] a case is reported in which the subject is discussed; and there is an evident inclination to make some sort of relaxation of the strict rule. Martin, J., said, "It has been decided that if land be given to a man for life, the remainder to the right heirs of one A who is alive, and then

[1] §§ 720-723. [2] § 720. [3] § 721.

[4] § 722; for this rule see Bk. iv Pt. II. c. 1 § 3; it really follows from the third rule which prohibits the limitation of a condition or a right of entry to a stranger, see Challis, Real Property (3rd ed.) 81.

[5] § 723; vol. ii 594. [6] Y.B. 9 Hy. VI. Trin. pl. 19.

A has issue and dies, and then the tenant for life dies, the heir of the stranger (A) will have the land; and yet at the time of the grant the remainder was in a manner void.—This was not denied; but Paston, J., said that that did not appear reasonable. *Babington.*—The point is one which is argued in the moots." In 1453, however, the law was settled as laid down by Martin, J.,[1] though Littleton would not have approved.[2] This decision did not, of course, mean that all contingent remainders were valid. It settled only that a remainder to the heir of a living person was valid if that living person died before the precedent estate fell in. We shall see that as late as 1536 the court had serious doubts about a remainder the vesting of which was dependent upon a contingency of another kind.[3] It is not till the following period, when contingent remainders became firmly established in the law, that the rules which governed them began to be definitely ascertained.[4]

It has been thought by some[5] that a discussion in one of the Books of Assizes,[6] shows that in Edward III.'s reign the law had not definitely decided against the validity of contingent remainders. But, in the first place, the discussion is somewhat inconclusive,[7] and the decision is opposed to the other cases cited above. In the second place, the case turned upon the provisions of a will devising lands in Winchester which were devisable by custom. The case of the year 1430,[8] which was also a case of devise, shows clearly enough that we cannot reason from the limitations possible in a devise to the limitations possible in a deed. In that case *Godred* said, "A devise is a much stronger thing than a grant by deed; for if . . . land is leased by deed to a man for life, remainder over in fee, and there is no such man *in rerum natura*, the remainder and all is void, for *debile fundamentum*, etc., but if one devises under similar circumstances, the remainder is good;" and *Babington* said, "The nature of a devise, where lands are devisable, is such that one can devise that one's land be sold by executors, and this is good, as has been said before; and the principle of the law is marvellous; but it is the nature of a devise, and this form has been used from all time. And thus one can get a good estate of freehold from him

[1] Fitz., Ab. *Feffementes* (H. 32 Hy. VI.) pl. 99, "Si terre soit done a un home en taille le remainder as droit heires d'un I que est en vie, si I devie devant le donor, le remainder est bon, autrement nemi, *per totam curiam.*"

[2] Above 135.

[3] Bk. iv Pt. II. c. 1 § 3.

[4] Ibid.

[5] Digby, History of the Law of Real Property 263 n.

[6] 30 Ass. p. 47 (tr. Digby (4th ed.) 269-271).

[7] See the opinions of Finchden and Fish.

[8] Y.B. 9 Hy. VI. Trin. pl. 19; above 135 n. 6.

who had none, just as one gets fire from flint, and yet no fire is in the flint."[1]

NOTE UPON *Taltarum's Case*

The pleadings in this case will be found translated and explained in Digby's History of the Law of Real Property 253-255. They are here presented in a tabular form in order that they may be more easily followed.

The defendant's pleading.	*The plaintiff's pleading.*	*The defendant's reply.*
T.B., seised in fee,	T.B., seised in fee,	Humphrey, before Taltarum brought his action, enfeoffed one Tregos in fee. Tregos gave the lands to Humphrey and his wife Jane in tail, remainder to the right heirs of Humphrey. Jane died without issue, whereby Humphrey became tenant in tail after possibility. While seised of that estate Taltarum brought his action, after which Humphrey still remained seised. Therefore this recovery barred only the tenancy in tail after possibility. Therefore, after Humphrey's death, Richard, the second son, entered, as well he might.
gave in tail to	gave in tail to	
W. Smith;	W. Smith;	
descent to son	who had two sons,	
Richard;	Humphrey (1). Richard (2).	
descent to son	H. entered as eldest son *per formam doni;* against him Taltarum brought a writ of right. In that action Humphrey vouched King to warranty; King imparled and made default; Taltarum therefore had judgment against Humphrey for the land; and Humphrey had judgment against King for compensation — *i.e.* Humphrey suffered a recovery; Taltarum being seised of the land enfeoffed the plaintiff.	
J. Smith (the defendant).		
The plaintiff entered upon the defendant, claiming by colour of a deed of gift made before the gift in tail to W. Smith; thereupon the defendant ousted the plaintiff, and it is for this ouster that the plaintiff sues.		

The argument in the case really turned upon the question whether the recovery suffered by Humphrey in favour of Taltarum only barred Humphrey's tenancy in tail after possibility; or whether it could bar all other estates, and confer the fee simple; this was treated as depending on the doctrine of remitter (vol. ii 587).

§ 7. INCORPOREAL THINGS

We have seen that the list of incorporeal things known to the mediæval common law was large;[2] and that the law treated them so far as possible as if they were actual corporeal things.[3] To write a full history of all these things, even though that history were confined to the mediæval period, would be far too long a task to be here attempted. We must leave on one side the offices, the franchises, the seignories, and the tithes, in favour of the advowsons, the commons, the rents, and the easements, because they hold and long have held a much more important place

[1] This is used as a metaphor simply. It is not used as the doctrine of *scintilla juris* was used in later law as a serious legal doctrine. The contrast illustrates what I have said, vol. ii 589-590, as to the difference between the mediæval and the later doctrines of the law of real property.

[2] Vol. ii 355-356.

[3] Above 97-101.

in English law. For the same reason I shall deal with certain covenants which have a peculiar relation to the land law. They are not incorporeal things, but they have some of the qualities of incorporeal things; and some principles borrowed from this branch of the law have been applied to them. Lastly, I shall deal with a topic peculiar to some of these incorporeal things—the topic of prescription. I shall deal, therefore, firstly with the four classes of incorporeal things mentioned above; secondly with certain covenants annexed to the land; and thirdly with prescription.

Advowsons, Commons, Rents, and Easements

Advowsons.

"An advowson is the right to present a clerk to the bishop for institution as parson of some vacant church; the bishop is bound to institute this presented clerk unless he can show one of some few good causes for refusing to do so."[1] The law as to advowsons is part of the *jus patronatus* of the canon law;[2] and the general idea of an advowson is therefore derived from that law. But, in England as abroad,[3] it is intimately related to the land law. We have seen that on that account the title to and possessory rights in an advowson were matters which fell within the jurisdiction of the royal courts, and that they were protected by appropriate real actions—the writ of right of advowson, the assize of darrein presentment, and the quare impedit.[4] We shall see that, for many different reasons, disputes as to the title to and the possession of advowsons, and as to many other matters relating to them, gave rise in the Middle Ages to an enormous mass of litigation. But into the details of the many rules which were established as the result of this litigation it would be both useless and tedious to enter. The chief service that this large amount of litigation did for English law was the elucidation of the nature of an incorporeal thing; and that it was able to perform this service was largely due to the fact that English law, like the law of the other countries of Western Europe, had accepted the main conclusion of the canon law as to the nature of the right of patronage.[5] But in order to explain this it will be necessary to say a few words as to the origin of the advowson. It will then be possible to indicate the manner in which this species of property

[1] P. and M. ii 135.
[2] Phillimore, Ecclesiastical Law (1st ed.) i 329, 330.
[3] Esmein, Droit Français (11th ed.) 177-178.
[4] Above 24-25.
[5] Thus Fleta 5. 14. 6, cites the decree of the Lateran Council as to the Bishop's right to present if the living be not filled up within six months.

was dealt with by the mediæval common law, and to see more clearly why, in the Middle Ages and later, it gave rise to so large an amount of litigation.

Blackstone's account of the word "advowson," and of the origin of the right of patronage, which is conferred by it, in substance represents the final stage which had been reached by the canon law in the latter part of the twelfth century. "Advowson, *advocatio*," he says,[1] "signifies *in clientelam recipere*, the taking into protection; and therefore is synonymous with patronage, patronatus: and he who has the right of advowson is called the patron of the church. For, when lords of manors first built churches on their own demesnes . . . the lord who thus built a church, and endowed it with glebe or land, had of common right a power annexed of nominating such minister as he pleased (provided he were canonically qualified) to officiate in that church of which he was the founder, endower, maintainer, or, in one word, the patron." This right of patronage, which had thus come to be recognized by the canon law of the twelfth century, was the product of an historical development. During the dark ages which followed on the overthrow of the Roman Empire landowners of all kinds, lay and ecclesiastical, had put forward claims to be the owners of churches. In fact these churches had come to be regarded as things attached to the land, which could be disposed of by the landowner, just as he disposed of other rights connected with the land.[2] All that the church could do was to take precautions that fitting clerks should be presented, and that they should be given a sufficient income.[3] It was not till the pontificate of Alexander III. (1159-1181) that it was recognized that the landowner was not the owner, but the patron of the church—that what he owned was not the church but the incorporeal right of patronage.[4]

[1] Bl. Comm. ii 21; cp. Co. Litt. 119b, "Advowson, *Advocatio*, so called because the right of presenting to the church was first gained by such as were founders, benefactors, or maintainers of the church: viz. *ratione fundationis*, as when the ancestor was founder of the church; or *ratione donationis*, when he endowed the church; or *ratione fundi*, as when he gave the soil whereupon the church was built: and therefore they were called *Advocati*. They were also called *Patroni*, and therefore the Advowson is called *Jus Patronatus;*" Fleta 5. 14. 2; Esmein, Droit Français 177.

[2] "Beacoup de particuliers, grands propriétaires et seigneurs en puissance, se pretendaient propriétaires des chapelles et des églises . . . leur prétention, reconnue et consolidée par la coutume, résultait de cette tendance qui portait alors les hommes a considérer tous choses sous leur aspect matérial et pécuniarement profitable. Les établissements ecclésiastiques, convents et évêchés, revendiquaient cette proprieté et en tiraient profit, aussi bien que les laics. . . . Dans le desordre de la monarchie franque, ces pretentions s'accentuèrent et triumphèrent. Cela aboutit à une théorie assez nette: l'église envisagée sous son aspect matérial, etait un dépendance du sol; . . . naturellement le seigneur disposait de l'église à sa volonté, comme il pouvait disposer du sol, l'un emportait l'autre et, tous les modes de succession et d'alienation lui étaient applicables," Esmein, op. cit. 177.

[3] Ibid 178.

[4] Ibid.

But the older ideas died hard. In England the common law administered by the king's courts, often represented a comparatively primitive order of legal ideas; and these primitive legal ideas tended to become stereotyped when, at the end of the thirteenth century, the influence of the civil and canon law ceased to be felt.[1] We can see an illustration of the conflict between the older and the newer ideas as to the nature of the advowson in Bracton's treatise. He tells us that laymen commonly confused the ownership of the church and the right of patronage. These two things were, as he points out, quite distinct. The gift of a church did not properly convey the right to present. If it was desired to give the right to present, what should be given was, not the church, but the advowson.[2] "Nevertheless," he says,[3] "the gift of a church is by custom and use differently interpreted and understood. For instance, if a man says I give such a church to such a monastery, when he should have mentioned in his gift the advowson, this gift will be sufficient to transfer the advowson; and, on account of the simplicity of the lay folk, it is interpreted as if the layman gives by these words all the right which he had in the church, that is to say the advowson together with the church." The native development of English law made for the perdurance of these ideas. And so we see that, like other rights annexed to the land, the advowson is treated both by the adjective and the substantive law as if it were a piece of land. The actions by which it is protected,[4] the manner in which it is conveyed and in which the doctrines of seisin and disseisin are applied to it,[5] the mode in which it will devolve on death[6]—all follow the rules as to corporeal hereditaments.[7] If we consider the manifold complications both of the procedure in the real actions, and of the substantive doctrines of the mediæval land law; if we remember that the advowson and the many questions centering round it stood on the frontier of the lay and ecclesiastical jurisdictions,[8] and that the exercise of the right of presentation involved,

[1] Vol. ii 287.

[2] f. 53a.

[3] "Habet tamen hujus modi donatio ex consutudine et ab usu aliam interpretationem et alium intellectum, ut si dicat quis, Do talem ecclesiam talibus viris religiosis, ubi mentionem facere debet de advocatione, sufficit donatio talis, quantum ad jus advocationis transferendum, et propter simplicitatem laicorum interpretatur, quod laicus per hæc verba dat quicquid juris habuit in ecclesia illa, id est jus advocationis, simul cum ecclesia illa," ibid; Bracton's Note Book case 1418; P. and M. ii 135.

[4] Above 24-25.

[5] Above 98, 100; Bracton f. 243b; Co. Litt. 307a.

[6] Thus it descends to daughters as coparceners who present in turn according to age, beginning from the eldest; cp. Y.B. 6 Ed. II. (S.S.) 61 *per* Bereford, C.J.; Co. Litt. 18a.

[7] "An Advowson wherein a man has as absolute ownership and property as he hath in lands or rents," Co. Litt. 17b.

[8] "Jurisdiction in matters of patronage belongeth to this court, but jurisdiction as to parsonage belongeth to Court Christian; and no matter how he acquired posses-

in most cases, the action of the bishop as well as of the patron;[1] if we bear in mind that the king was the owner of many advowsons and had peculiar prerogatives in relation to them; if we recall the fact that wealthy monasteries[2] and large landowners were also the owners of many more; and if we remember that there had been much legislation on the subject of advowsons[3]—we shall not be surprised at the enormous mass of litigation to which in this litigious age, the advowson gave rise. As the result of this litigation the rules relating to it were developed with such minuteness that little was left to be added by the lawyers of a later age.

From the point of view of the history of English law the main interest of this development of the law as to advowsons is, as I have said, the impetus which it gave to the elucidation of the nature and, to some extent, of the classification of incorporeal things. The canon law had made it perfectly clear that the right of patronage—the advowson—was an incorporeal right quite distinct from the ownership of a corporeal church. No doubt, as we have seen, the mediæval common lawyers made this incorporeal right as much as possible like the right to corporeal land. No doubt Bracton has great difficulty in fitting the conception of this incorporeal right on to the very materialistic rules of English law. If a view is demanded in a writ of right of advowson, how can it be given of an intangible right?[4] How can such a right be taken into the king's hands?[5] But, for all that, there can be little doubt that the analysis of the nature of an incorporeal thing which at different points in his treatise Bracton gives in connection with advowsons,[6] greatly helped English lawyers to grasp

sion, we cannot oust him, for we cannot determine whether he be the right parson or not," Y.B. 5 Ed. II. (S.S.) 170 *per* Bereford, C.J.; for the history of the manner in which jurisdiction over the question of the plenarty or voidance of a benefice came to be divided between the temporal and ecclesiastical courts see T. F. T. Plucknett, Camb. Law Journal no. 1 60-75.

[1] Unless the advowson was collative or donative, Co. Litt. 119b, 344a; Phillimore, Ecclesiastical Law i 331-332.

[2] The fact that these monasteries were aliens, and sometimes alien enemies, also gave rise to litigation, see Y.B. 17, 18 Ed. III. (R.S.) 266-278.

[3] For a case turning on the Stat. of West. II. c. 5 see Y.B. 6 Ed. II. (S.S.) 48 seqq.; for cases turning on the statute 14 Edward III. st. 4 c. 2 see Y.B. 15 Ed. III. (R.S.) 262-264.

[4] "Et quamvis hujusmodi jura videri non possunt cum sint invisibilia, nec palpari sicut corpora, tamen cum sine corpore vel subjecto quibus insunt esse non possunt, res illæ videri possunt et palpari, et unde sufficit pro visu quod res corporatæ in quibus jura consistunt designentur, vel per visum vel per quod tantumdem valet," Bracton, ff. 377b, 378a.

[5] "Sed cum jus advocationis ecclesiæ incorporale sit, et per defaltam tenentis aliquando præcipiatur vicecomiti quod illum capiat in manum domini regis . . . qualiter potest in manum domini regis capi, quod videtur impossibile?" the answer is "dicetur vicecomiti quod capiat ecclesiam in manum domini regis simplici capcione, et per consequens capit id quod inest corpori," ibid ff. 378a, 378b.

[6] See f. 53b, and the last two notes.

the meaning of an incorporeal thing. Thus we have seen that in 1334 Herle's statement shows that the distinction between the gift of a church and the gift of an advowson had been fully grasped; and that in 1341 and 1344 the courts were fully alive to its incorporeal character.[1]

Similarly it was in the law relating to advowsons that we can see the beginnings of the classification of incorporeal things into rights appendant, appurtenant, and in gross. Normally and regularly an advowson was appendant to a manor. An advowson thus appendant passed with the manor without special mention.[2] "But advowsons are often severed from the manors to which, in legal theory, they had some time or other belonged. The lord gives the manor but retains the advowson, or else he gives the advowson but retains the manor. The latter transaction is common; numerous advowsons are detached from their manors by being given to religious houses. An advowson thus detached becomes, to use a phrase which is current in the last years of the thirteenth century, 'a gross' that is, a thing by itself, a thing which has an independent existence."[3] Thus we get the modern idea of an incorporeal thing in gross as contrasted with one which is appendant. Further, it would seem that if an advowson was annexed, not to a manor, but to a messuage or some other specified piece of land, it was sometimes, in Edward II.'s reign, spoken of as appurtenant.[4] In this we may possibly see the germ of the distinction between rights appendant, i.e. annexed immemorially and of common right[5] to land, and rights which are appurtenant, i.e. annexed by special act of the parties to the land.[6]

When Blackstone took the advowson as the type and model of an incorporeal hereditament,[7] he was doing a great deal more than giving an apt illustration. He was indicating an historical truth. The canonists had developed from the old crude idea of the ownership of a church the idea of the incorporeal right of

[1] Above 98.

[2] Bracton f. 55; Co. Litt. 307a.

[3] P. and M. ii 135.

[4] "We have made the advowson appurtenant to the messuage from the time of king Henry till now, by means of presentments which have been made as appurtenances," Y.B. 4 Ed. II. (S.S.) 179 *per* Malberthorpe *arg.*; on the other hand, an advowson was said to be appendant to a manor, ibid 181; but probably at this time the distinction was not very fully grasped, see Y.B. 6 Ed. II. 48-49, 85; moreover, it is difficult to distinguish the two words when they are abbreviated and in their Latin form, below 148.

[5] For this phrase see below 168-169.

[6] "Appendants are ever by prescription, but appurtenances may be created in some cases at this day," Co. Litt. 121b; for the evolution and application of this distinction in the case of rights of common see below 147-150; note that when Coke said that "appendants are ever by prescription," he was not using the word "prescription" in its technical sense, but simply to denote immemorial user; as we shall see, common appendant could not be claimed by prescription, below 149, 169.

[7] Comm. ii 21-22.

patronage. The courts of common law naturally took over this idea when they asserted jurisdiction over advowsons; and, as we shall now see, it helped them to build up the law as to other kinds of incorporeal things.

Commons.

There are many varieties of rights to profits a prendre in alieno solo known to the common law, and most of them may be the subjects of common rights. These common rights were a necessary part of that common or open field system[1] upon which most of the land of England was cultivated for many centuries.[2] Thus we find common of turbary, or the right to cut turf for fuel; common of estovers, or the right to cut timber, underwood, furze, etc., for fuel or litter; common of piscary, or the right to fish in another's water; and, by far the most important of all,[3] the right of common of pasture. It is this right with which we are here concerned.

Rights of common of pasture may be divided according to their legal qualities into different classes—common appendant, common appurtenant, common in gross, common pur cause de vicinage, and common of shack.[4] The distinction between the first two of these classes is thus stated by Mr. Scrutton.[5] "Common Appendant is the right which every freehold tenant of the manor possesses to depasture his commonable cattle, levant and couchant on his freehold tenement anciently arable, on the wastes of the manor, and originally on all (common) pasture in the manor. . . . Common Appurtenant, on the other hand, is against common right, becoming appurtenant to land either by long user or by grant express or implied. Thus it covers a right to common with animals that are not commonable, such as pigs, donkeys, goats, and geese; or a right to common claimed for land not anciently arable, such as pasture, or land reclaimed from the waste within the time of legal memory." Common in gross, on the other hand, is not annexed to the holding of any land. It is a personal as opposed to a prædial right. Common pur cause de vicinage exists where there are adjoining wastes belonging to two different manors and the tenant of each manor is allowed to put his beasts

[1] Vol. ii 56-61.

[2] "The common, so far from being an incidental or occasional feature, or a separate and auxiliary means of small gains, was an integral part of a system," E. C. K. Gonner, Common Land and Enclosure 4.

[3] "Sed quoniam magis celebris est illa servitus per quam conceditur alicui jus pascendi; ideo primo dicendum est de ea quæ dicitur communia pasturæ," Bracton f. 222a.

[4] A large part of the mediæval learning is ably summarized by Coke in Tyrringham's Case (1584) 4 Co. Rep. 36b; for a good modern account see Gonner, op. cit. 96-100.

[5] Commons 42, 43, cited Vinogradoff, Villeinage 265, 266.

on the wastes of the other.[1] Common of shack existed, as we have seen, in some parts of the country, over lands of the manor after harvest and before the land was sown; or over those parts of the manor which, according to the course of cultivation there pursued, were for the time being lying fallow. During these periods the cattle of the village were pastured promiscuously over the open fields.[2] These rights of common might be, and usually were, enjoyed not only by the freehold but also by the villein, or later copyhold tenants of the manor.

There have been two views as to the historical origin of rights of common. According to one view, they owed their origin to a grant of the lord. This view long was, and perhaps still is, the theory of the common law.[3] Certainly we owe to it the undoubted rule of law that all rights of common must originate in a grant, and cannot therefore be claimed by an indefinite collection of persons because they cannot take a grant[4]—a conclusion which is contradicted by the fact that the numerous miscellaneous communities of the Middle Ages were capable of very various activities, rights, and liabilities.[5] It has been defended by Mr. Scrutton,[6] who relies on the words of Bracton; but, as I have said above, we must be careful lest we miss historical truth by not making allowance for the fact that Bracton, like other common lawyers, looked at all legal phenomena from the point of view of the feudal and individualistic ideas of the royal courts.[7] As Sir Paul Vinogradoff has pointed out, if we take the bare rules of the royal courts it is wholly impossible to understand the principles which underlie these rules.[8] We must go deeper and adopt the other view as to the origin of these rights of common if we are to understand the principles which gave the rules their later form.

The other view, adopted by Joshua Williams[9] and Sir Paul Vinogradoff, finds the origin of rights of common in the prevalent

[1] Bracton ff. 222, 228b; Digby, History of the Law of Real Property 201 n. 2; Vinogradoff, Villeinage 264, 265; Bracton's Note Book cases 392, 1230.

[2] Vol. ii 57; Bracton ff. 222, 228b; Miles Corbet's Case (1585) 7 Co. Rep. 5a; disputes sometimes arose as to the mode of regulating these rights, see Y.BB. 3 Ed. II. (S.S.) 112, 113; 11, 12 Ed. III. (R.S.) 370; I think that the case reported in Y.B. 5 Ed. II. (S.S.) (1312) 125 refers to common of shack, and that "temps ouert" or "tempore aperto" means, not, as it is translated, "open weather," but at the time when the land is unenclosed, i.e. after harvest.

[3] Lord Dunraven v. Llewellyn (1850) 15 Q.B. 791; Williams, Real Property (17th ed.) App. F.

[4] Gateward's Case (1607) 6 Co. Rep. 59a; Warrick v. Queen's College, Oxford (1871) L.R. 6 Ch. Ap. 716, 724; below 170-171.

[5] Vol. ii 377; below 169.

[6] Commons and Common Fields chap. ii.

[7] Vol. ii 403.

[8] Vinogradoff, Villeinage 266-269; cp. also his book on the Growth of the Manor 165-170.

[9] Rights of Common 37-40.

mode of cultivating the land;[1] and this explains why the common rights of the free and the unfree tenant are so similar. The strip-holder in the common fields possessed not only his strips; he had as incident to his holding certain rights of common in the waste: we have here the germ of the common appendant of later law. In the days when large tracts of marsh or moor or wood separated villages it must have been difficult to define exactly the boundaries of each. It was natural that these villages should use such ground in common. "Neighbours deem it often advantageous to establish a certain reciprocity in this respect. By special agreement or by tacit allowance lords and tenants intercommon on each others' lands." It is "much too frequent to be considered, as it was by later law, a mere excuse for trespassing."[2] It is clear that we have here the common pur cause de vicinage of later law. The common of shack is of course sufficiently explained by the system of common field cultivation. Cases in the Year Books show that varieties of this custom sometimes gave rise to disputes.[3] This view, therefore, of the origin of rights of common explains most of the leading divisions of later law. It does not, however, explain the division between common appendant and appurtenant, nor does it explain the right of common in gross. The division between appendancy and appurtenancy does not clearly appear until the end of the fifteenth century.[4] Changes in the social order, changes in the agricultural system, and the growing precision of rules of law, altered and sharpened the rules relating to rights of common, and, by so doing, gave rise to this distinction. The recognition of the right of common in gross is due to the growth of the view that a right of common was rather a piece of property which could be granted by a lord to any one, whether connected with the manor or not,[5] than a necessary accompaniment of the system of agriculture.[6] I must now say something about the manner in which these changes came to pass.

[1] Vol. ii 56-61.

[2] Vinogradoff, Villeinage 264, 265 and authorities there cited; for a case where it arose by express agreement see Ramsey Cart. i p. 164; the view taken of it in later law is illustrated by the dictum of Manwood, C.B., in 1573, Dyer 316b, to the effect that, "such commoner by cause of vicinage may not drive, or put in his beasts into the other waste at first; but first in his own common, and then the beasts may well stray, and go into the other common, without being distrained."

[3] Vol. ii 547.

[4] Scrutton, op. cit. chap. ii; L.Q.R. iii 396. The first case in which we get anything like the modern distinction drawn is Y.B. 37 Hy. VI. Trin. pl. 20; for a grant of common appurtenant see Madox, Form. no. 485.

[5] Gonner, op. cit. 11, 98-99.

[6] Bracton did not consider it a right of common, "Item notandum quod non debet dici communia, quod quis habuerit in alieno, sive pro precario, sive ex causa emptionis, cum tenementum non habeat ad quod possit communia pertinere, sed potius herbagium dici debet quam communia;" but it is so considered in Edward I.'s reign, Y.BB. 21, 22 Ed. I. (R.S.) 28; 30, 31 Ed. I. (R.S.) 328; 32, 33 Ed. I.

The village community is, as we have seen, not far below the surface of the manor.[1] In many cases the lord was obliged to conform to the communal system of agriculture, and though he was the owner of the waste he was obliged to conform to the rules as to its user. These rules were asserted against him not only by his freehold tenants, as against whom he would be estopped by his grant from diminishing any rights of common incident to holdings which had been granted by himself, but also by the whole community, servile as well as free.[2] So completely were the rights of even the villeins to the common recognized, that the lord sometimes negotiated and entered into an agreement with them with reference to these rights.[3] But when the condition of the country improved, when more land came under cultivation, the question of the limits of the lord's rights was bound to arise. The free tenant could appeal to the courts against any diminution in his rights; and we cannot doubt that it was this fact which brought clearly into prominence the legal question, Can the lord approve the common without the consent of the tenants? On the whole it is probable that he could not;[4] but it is probable that it was a question (like the question of the free alienation of land by the tenant)[5] as to which there was no posi-

(R.S.) 464; cp. also Y.BB. 15 Ed. III. (R.S.) 184; 11 Hy. VI. Hil. pl. 19; in later law vestura or herbagium terræ is "a particular right in the land," Co. Litt. 4b; Robinson v. Duleep Singh (1878) 11 C.D. at p. 813.

[1] Vol. ii 72-73.

[2] Ibid 377-381; Vinogradoff, Villeinage 272, "The number and kind of beasts which may come to the common from his land is fixed, as well as the number that may come from the land of a cottager. The freeholders alone can enforce the rule against him, but it is set up not by the freeholders, but by the entire community of the manor, and practically by the serfs more than by the freeholders, because they are so much more numerous;" Growth of the Manor 170-173; cp. Y.B. 32, 33 Ed. I. (R.S.) 228, 230 where *Hengham*, J., says, "I shall never be of any other opinion than that this writ (admeasurement of pasture) will serve as well between lord and tenant, as between neighbour and neighbour;" at p. 234 *Bereford*, J., says, "If the lord surcharge so that the tenant cannot have sufficient common he disseises him;" Y.B. 33-35 Ed. I. (R.S.) 8 *Hunt, arg.*, says, "Many a man has soil where he ought not to common."

[3] Select Pleas in Manorial Courts 172, "Ad istam curiam venit tota communitas villanorum de Bristwalton et de sua mera et spontanea voluntate sursum reddidit domino totum jus et clamium quod idem villani habere clamabant racione commune in bosco domini qui vocatur Hemele et landis circumadjacentibus . . . et pro hac sursum reddicione remisit eis dominus de sua gracia speciali communam quam habuit in campo qui vocatur Estfield."

[4] The authorities in favour of this view are the preamble to the Statute of Merton; Bracton's statement ff. 227, 228b; see also E.H.R. xxxiii 344-347 for three twelfth-century Lincolnshire charters in which sokemen consented to grants of the waste made by a lord; for the view held by the lawyers at the end of the century see Y.B. 20, 21 Ed. I. (R.S.) 354, 356, 464. That the law before the statute was not quite clear may be seen from Bracton's Note Book, case 1975—on the jurors declaring that a tenant has sufficient after an approvement made the plaintiff withdraws; cp. case 1881; the numerous assarts which were made about this period may perhaps show that a power to approve was assumed, Scrutton, op. cit. 65, 66.

[5] Above 76-79.

tive rule till new circumstances called for the making of such a rule.[1] The Statute of Merton (1235-1236),[2] after reciting the doubt which had arisen, provided that a lord should be able to approve as against his tenants, provided that he left them a sufficiency of common, with free ingress and egress to and from the common; and the question as to the sufficiency of the common and the freedom of ingress and egress was to be tried by assize. But this statute dealt only with rights of common as between a lord and his tenants. In 1285[3] these provisions were extended to rights of common as between neighbours, i.e. to common pur cause de vicinage, "because foreign tenants have no more right to common in the wastes, woods, or pastures of any lord than the lord's own tenants." It was also specially provided that if a man erected a windmill, a sheepcote, a cowshed, or made a necessary enlargement of his court or curtilage, no assize of novel disseisin for diminishing common of pasture should lie against him.[4] These statutes did not apply to any grant of common made specially by a lord.[5]

It was in the course of the three following centuries that the distinctions between common appendant, common appurtenant, and common in gross, grew up. They had begun to emerge at the end of the mediæval period; but it was not till the end of the sixteenth and the beginning of the seventeenth centuries that they attained their modern shape. The causes which gave rise to them were somewhat as follows:—

One effect of the statutes of Merton[6] and Westminster II.[7] was to draw a distinction between the kinds of common as against which the lord could approve, and the kinds of common as against which he could not approve. These statutes clearly applied to common appendant and to common pur cause de vicinage. The Statute of Westminster II. further provided that its provisions were to apply to those who claimed common of pasture as pertaining to their tenements; but that "if a man claimed common by a special feoffment or grant for a certain number of cattle, or

[1] See Gonner, op. cit. 101-104.

[2] 20 Henry III. c. 4; it was agreed in 1312-1313 that if admeasurement was impossible or difficult, owing to the fact that the common was claimed as appendant to a burgage tenement, there could be no common appendant; but this argument was over-ruled, Y.B. 6 Ed. II. (S.S.) 112-114.

[3] 13 Edward I. st. 1 c. 46.

[4] For a case on the meaning of this clause see Y.B. 2, 3 Ed. II. (S.S.) 38, "The statute has not so wide a meaning that by reason of his seignory a man may take and enclose another's common to make a meadow or pasture within his court; it only permits him to enlarge his court by curtilage or garden or what else is necessary for his court;" *per* Bereford, J.; for a modern case see Patrick v. Stubbs (1842) 9 M. and W. 870.

[5] 13 Edward I. st. 1 c. 46; below 148-149.

[6] 20 Henry III. c. 4.

[7] 13 Edward I. st. 1 c. 46.

otherwise than he ought of common right to have it, since agreement derogates from the law, let him recover his own as he ought to do in accordance with the form of grant made to him."[1] As the result of this enactment the Year Books of Edward II.'s reign distinguished common granted by specialty from common appendant.[2] But what did this common granted by specialty include? Did it include or did it exclude common appurtenant? The answer to this question is rendered the more difficult by the similarity of the two words. Both are abbreviated as "App." in the Year Books; and the same Latin word "pertinens" does duty for both; so that, as Coke says, we are driven to rely on the context to discover which is meant.[3] It would seem, however, that there is a good deal to be said for the view, which was put forward in argument as late as 1878,[4] that the statute excluded common appurtenant.[5] The statute distinctly excludes common which is against common right; and we shall see that common appurtenant was, as contrasted with common appendant, recognized to be against common right.[6] But this is not the view which has prevailed. The clause of the Statute of Westminster II. which has been set out above was mis-translated, and, in the mis-translation, was made to read "if any claim common by special feoffment or grant for a certain number of beasts or otherwise which he ought to have of common right." No one seems to have been aware of this mis-translation till it was pointed out by Joshua Williams.[7] It seems to have induced Coke to believe that the statute included both common appendant and common appurten-

[1] "Et hoc observetur de his qui clamant pasturam tanquam pertinentem ad tenementa sua. Sed si quis clamat communam per speciale feoffamentum vel concessionem ad certum numerum averiorum vel alio modo quam de jure communi habere deberet, cum conventio legi deroget, habeat suum recuperare, quale habere deberet per formam concessionis sibi factæ."

[2] Y.BB. 5 Ed. II. (S.S.) (1312) 147—"*Scrope.*—Whereas he saith that he is seised, we tell you that he is seised in this manner, by his payment of twenty shillings in some years and of four marks in others for the privilege of commoning, etc., and so he is not seised of it as appendant, but by his own payment; ready, etc. *Denham* seised as appendant, ready, etc.;" 6 Ed. II. (S.S.) 113. "*Herle.*—If you claim this common you must claim common appendant or by specialty;" ibid 126-"*Toudeby.*—In what way your common? By specialty or as appendant?"

[3] "And it was said in this case this word *pertinens* is Latin as well for appurtenant as appendant, and therefore *subjecta materia;* and the circumstances of the case ought to direct the court to judge the common to be appendant or appurtenant," Tyrringham's Case (1584) 4 Co. Rep. at f. 38a.

[4] Robinson v. Duleep Singh 11 C.D. at p. 821.

[5] In Y.B. 20, 21 Ed. I. (R.S.) 432-436 Berwick, J., held that a grant to a man by charter of the right to common "in the same manner as his neighbours do common" gave the lord the same right to approve against him as he had to approve against his neighbours; the reporter appends a note "that in this case the charter does not hold good," evidently thinking that, if it had, there would be no right to approve; and in Y.B. 3 Ed. II. (S.S.) 136-137 Stanton, J., seems to take the view that if a lord granted his tenant common by deed, i.e. common appurtenant, he could not approve against him.

[6] Below 149, 169.

[7] Rights of Common 111.

ant, and excluded only common in gross;[1] and this view was upheld in 1878 by the judgment of the court of appeal,[2] Cotton, L.J., relying on the mis-translated passage in the Statute of Westminster II.[3] No doubt this interpretation was expedient. We shall see that common appurtenant was tending to become of greater importance than common appendant;[4] and it was not in accordance with the agricultural policy pursued by the Tudors,[5] or with the economic views of the court of appeal in 1878,[6] to throw insuperable obstacles in the way of improvements which increased the productivity of the soil. Technically the result of this interpretation has been to cause the provisions of these statutes to bring out the distinction, not between common appendant and common appurtenant, but between these two kinds of common and common in gross. As we shall now see, other causes were bringing out the distinction between common appendant and common appurtenant.

In the first place, one effect of the working of the Statute of Quia Emptores was to diminish the number of cases in which common could be claimed as incident to tenure of a manor, because, after the passing of that statute, on a feoffment in fee, the tenant did not hold of the manor. Such tenants, therefore, if they were given a right of common, must have a right of common appurtenant.[7] This tended to increase the number of cases in which tenants in the manor had these different rights of common. In the second place, we have seen that the Statute of Westminster II. distinguished those rights of common which were of common right from those which were not.[8] Though the significance of this distinction, so far as relates to approvement, had been obscured by a mistranslation of the statute, the distinction survived, and gave rise to two practical consequences. Firstly, because common appendant was of common right it could not be prescribed for; but common appurtenant, being contrary to common right, could be prescribed for.[9] This rule was clearly laid down in Henry VI.'s reign, and it is noted by the reporter as if it was a new idea to him.[10] Secondly, common appendant was not destroyed by unity of seisin. If the person having a right of common appendant, acquired the land over which it

[1] "So here it is to be observed that neither this statute nor the statute of Merton doth extend to any common, but to common appendant or appurtenant to his tenement, and not to a common in gross to a certain number," Second Instit. 475.

[2] Robinson v. Duleep Singh 11 C.D. 798.

[3] Ibid at p. 822.

[4] Below 150-151.

[5] Bk. iv Pt. I. c. 1; it may be noted that the statutes of Merton and Westminster II. were approved and confirmed by 3, 4 Edward VI. c. 3 § 2.

[6] Robinson v. Duleep Singh 11 C.D. at p. 815 *per* James, L.J.

[7] Co. Litt. 121b; L.Q.R. iii 397.

[8] Above 148 n. 1.

[9] Below 169.

[10] Y.B. 22 Hy. VI. Mich. pl. 13 *per* Newton and all the court; cp. Y.B. 4 Hy. VI. Hil. pl. 10; Co. Litt, 121b.

existed, and afterwards granted this land to another, the right of common revived;[1] and similarly if he purchased part of the land over which it existed, the common was apportioned.[2] But in both these cases the right of common appurtenant ceased to exist.[3] In the third place, the older rights of common, to which the statutes of Merton and Westminster II. applied, could only be attached to arable land anciently held of the manor. No right of common could attach to any other land, or therefore to any part of the waste which had been approved, otherwise than by express grant.[4] In the fourth place, the hardening of the distinction between free and copyhold tenure led the lawyers to put into different categories the common rights attached to freeholds held anciently of the manor, and the common rights attached to copyholds. The right of a copyholder as against his lord was a right which was dependent upon manorial custom; and if he wished to claim common by long user as against another he must prescribe in the name of his lord.[5] All these causes tended to differentiate these two species of rights of common; and it was therefore only natural that they should come to be known by different names. Rights of common which depend on express grant or prescription are rights appurtenant: those which do not are rights appendant.[6]

Common appurtenant was destined to increase at the expense of all the other rights of common of pasture formerly known to the law, just as socage tenure increased at the expense of the other free tenures.[7] With the disuse of the common-field system common of shack gradually went out of use, and the growth of population and the improvement of the country rendered infrequent common pur cause de vicinage. Common appendant was confined to the rights of the freehold tenants of the manor; and the doctrine of the royal courts that an unincorporate community could not claim a right of common by prescription, because no grant could be made to it,[8] probably destroyed many

[1] "If I have land to which common is appendant, and I purchase the land in which I used to have the common, and afterwards I give the land to which the common was appendant to you, you will have the common, notwithstanding the unity of seisin of both lands," Y.B. 20 Ed. III. (R.S.) ii 64-66 *per* Willoughby, J.

[2] Tyrringham's Case (1584) 4 Co. Rep. at ff. 37b, 38a; Wyat Wyld's Case (1610) 8 Co. Rep. at f. 79a.

[3] Last note; but on alienation of part of the land to which the common is appurtenant it will be severed, for, if the law were otherwise, "all common appurtenants in England would be destroyed, which would be against the commonwealth," Wyat Wyld's Case at f. 79b; Co. Litt. 122a.

[4] Bracton f. 225b; Y.B. 26 Hy. VIII. Trin. pl. 15.

[5] Forston v. Crachroode (1587) 4 Co. Rep. 31b; cf. Gateward's Case (1607) 6 Co. Rep. at f. 60b; these rights can hardly be classed, as Scrutton, op. cit. 43, classes them as rights of common appurtenant.

[6] Above 143. [7] Above 53. [8] Below 170-171.

customary rights enjoyed in the Middle Ages. Any right of common not appendant and not belonging to the other classes of common came to be considered as a right of common appurtenant. Thus common appurtenant came to mean, not only a right of common depending upon express grant or prescription, but also a right of common belonging to a tenant of the manor to turn out beasts other than commonable beasts,[1] and a right attached to land other than ancient arable land.[2] Probably rights of common appurtenant, rights of common in gross, and customary rights of common enjoyed by the copyholders, are the three most usual classes of rights of common at the present day.

Rents.

A rent was one of the services in return for which land might be granted. It issued out of the land. It could be distrained for by the lord in whosoever's hands the land was. It was treated as a thing—a tenement—just like the land.[3] Such rent service ceased to be rent service if the lord granted it to another. It became rent seck. The grantee, not being the lord, could not distrain; but for all that the rent was still regarded as a thing. The grantee to complete his title must get seisin;[4] and if he had got seisin he was protected by the assize of novel disseisin or the quod permittat.[5] The effect of the Statute Quia Emptores was to make a reservation of a rent service on a grant in fee simple impossible. Instead, the grantee charged his lands with the payment of rent to the grantor, and gave him expressly a power of distress—hence we get the rent charge, the grantee of which was, so far as remedies by action went, in the same position as the grantee of a rent seck. We can see these different kinds of rent from an early period. They are distinguishable in the Year Books of Edward I. and III.'s reigns;[6] and are, as we have seen, defined in their modern sense by Littleton.[7]

All these rents issued out of land; they were in a sense part of the land which was charged with their payment. But a man might promise to pay a rent without definitely charging any particular land with its payment.[8] A person entitled to a payment of this kind was not entitled to the protection of the real

[1] Y.B. 37 Hy. VI. Trin. pl. 20.
[2] Above 150; Williams, Real Property (17th ed.) 633.
[3] P. and M. ii 129-132; Holmes, Common Law 389, 390.
[4] Above 100-101.
[5] Above 19-20; Y.B. 9 Hy. VI. Trin pl. 7 *per* Paston, J.
[6] Y.BB. 30, 31 Ed. I. (R.S.) 420; 11, 12 Ed. III. (R.S.) 500; 18, 19 Ed. III. (R.S) 20.
[7] Vol. ii 577; cp. Plowden 132.
[8] P. and M. ii 132; cp. Y.B. 33-35 Ed. I. (R.S.) a writ of annuity for an annual sum promised in return for the services of a pleader; Y.B. 6, 7 Ed. II. (S.S.) 80-84 a like writ for a sum promised for medical attendance.

actions—a rent which came from nowhere in particular was not sufficiently intimately connected with the land.[1] For such "annuities" a writ of annuity was invented about the end of Henry III.'s reign. It is clear that actions brought under this writ were sufficiently real to preclude wager of law;[2] and that these annuities, though unconnected with the land, were regarded as incorporeal things,[3] which "savoured of the freehold."[4] The grantee may be in difficulties if he cannot allege seisin.[5] They are said to issue from the grantor's chamber—and it was in Edward I.'s reign a moot point as to the proper venue of such an action. The reporter of Edward I.'s reign drew distinctions based upon the approximation of the annuity to a thing or to a contract respectively. His words show us that even then the annuity had this double aspect.[6] It was not till the law of contract developed that the practice of granting such annuities was superseded by the practice of creating contractual obligations.

Somewhere between the rent which is a tenement and the mere annuity is the corody. A corody is a grant, usually by a religious house, to some person of clothing, board, and lodging for a fixed period.[7] It might represent a reward for service done

[1] Bracton f. 180; Bracton's Note Book case 52; "the statute [West. II. c. 25] speaks of taking profits, as nuts or acorns, in a place certain; and the case of an annuity charged upon a manor is similar. But if I grant you an annuity issuing from my chamber, that is not a place certain, for my chamber is there where I myself happen to be or to be sojourning, and in that case you cannot have an assize," the Eyre of Kent (S.S.) iii 142 *per* Scrope *arg.*

[2] Y.B. 6, 7 Ed. II. (S.S.) 82-83.

[3] See Y.BB. 3 Ed. II. (S.S.) 137, 138; 16 Ed. III. (R.S.) ii 478; 18 Ed. III. (R.S.) 352—it is prescribed for as a thing; but this seems to be overruled in Y.B. 49 Ed. III. Hil. pl. 9 by *Belknap* and the whole court—their personal character is emerging; on the other hand, prescription was allowed in Y.B. 12 Rich. II. 136, and the fact that it was claimed in this way was held to show that it was not a merely contractual right, and so the claim could not be barred by a release of actions for debt account or any other contract; but in Y.B. 21 Ed. IV. Hil. pl. 83 the court was divided as to their real or personal character, and consequently as to their capacity to be assigned.

[4] The Eyre of Kent (S.S.) ii 51 *per* Bereford, C.J.

[5] Y.B. 21, 22 Ed. I. (R.S.) 128, 540; in Y.B. 6, 7 Ed. II. (S.S.) 120 there is an allegation that the plaintiff is seised.

[6] Y.B. 20, 21 Ed. I. (R.S.) 320, "Note that if a man bind himself by a writing to pay an annuity, the process depends on the form of the writing; that is to say, if the writing mentions that the annuitant is to receive the annuity from his chamber at such a place, then the writ shall issue to the sheriff of the county where the place is; and if the writing makes no mention of the place where he is to receive the annuity, but only says that he is to receive it from his chamber, then the grantee shall bring his writ in the county where the obligor is, wheresoever the chamber may be: for his chamber is where he himself is. And if the writing make no mention of either, but only binds him to pay yearly forty shillings, then the grantee must bring his writ in the county where the contract was made;" cp. Y.B. 3 Ed. II. (S.S.) 137, 138; the Eyre of Kent ii 50-51; in the latter case it is held that an annuitant could sue for the arrears of an annuity by writ of debt; but that, if he tried to enforce payment by such a writ during the currency of the annuity, he would be for the future unable to recover any further instalments.

[7] Plummer, Fortescue 337-339; P. and M. ii 133; see e.g. Y.B. 21, 22 Ed. I. (R.S.) 576 the keeper of the gate of the abbey of Westminster had a corody of two

or to be done, or a bargain and sale by one who wished to provide for old age,[1] or an obligation which a religious house owed to its founder or to the crown. The crown often used corodies to reward its servants or officials; and exemptions from the duty got by religious houses were sometimes made a matter of complaint by Parliament.[2] Such a grant issued out of a certain place—it is more real than an annuity. It was not charged on any specific land—it is less real than the rent.[3] However, in 1285[4] those entitled to corodies were allowed to bring the assize of novel disseisin. If an efficient remedy was wanted the legislator was then obliged to go to the real actions; and this, of course, emphasized the reality of what we should consider to be a merely personal obligation.[5] Annuities and corodies in theory formed a class of incorporeal things till the abolition of the real actions.[6]

In the case of rents, as in the case of many other incorporeal things known to the mediæval common law, the exaggerated development of the real actions as compared with all others made an excessive "realism" the line of least resistance to the mediæval legislator when he wished to protect adequately new legal relations. It shows us why, from the days of Bracton to the days of Littleton, we must look to the land law for rules about transactions which in modern times belong to quite different branches of the law.[7]

Easements.

In our modern law an easement is the right either of using the land or streams of another for certain defined purposes, such as walking, or driving, or turning a mill; or the right of restraining the owner from using his land in certain defined ways, such

white loaves, and of one gallon and a half of ale, and of two messes of meat from the convent kitchen, and of six shillings of rent, and a cartload of hay and a truss of grass.

[1] Eynsham Cart. i no. 335 (a pension to an old servant); no. 360 (pay of the porter); no. 496 (pay of the mason); no. 203 (in return for a covenant to leave all movables and immovables to the abbey); no. 257 (in return for a gift of land); for some late instances see Rievaulx Cart. 354, 355.

[2] R.P. v 184a, 301b, cited Plummer, op. cit. 339; see Ramsey Cart. iii 99-108, where the king's right is successfully disputed; Eynsham Cart. i no. 552, where it is acceded to.

[3] Y.B. 21, 22 Ed. I. (R.S.) 326, 328. *Howard, arg.*, says, "By their writ they demand it as a rent which is issuing out of the soil; and by their demonstrance it was a corody which is not issuing out of the freehold . . . judgment of the contrariety."

[4] 13 Edward I. st. 1 c. 25.

[5] Y.BB. 21, 22 Ed. I. (R.S.) 580, 582 the descent and alienation of a corody is traced; 18 Ed. III. (R.S.) 342 *Mowbray, arg.*, said that in proceedings for a corody the view could be had, as in other real actions, and that what would be put in view would be the abbey.

[6] Bl. Comm. ii 40.

[7] Vol. ii 280-281, 590.

as building on it so as to obstruct the access of light, or digging in it so as to let down a house. In both cases the duty of the servient owner is to permit; but in the first case the right of the owner of the dominant tenement is to do positive acts; in the second case the right of the dominant owner is merely to prevent acts being done which would interfere with the enjoyment of his property. In the first case, therefore, the easement is called positive; in the second case it is called negative.[1] We have seen that Bracton, when speaking of such rights, borrowed both the language and the principles of Roman law;[2] and through Bracton Roman law has had a good deal of influence upon our modern law of easements.[3] In modern times it is well settled that, to use Roman terms, an easement is a prædial servitude. There can be no such thing as an easement in gross; and herein an easement differs from a profit a prendre.[4] But, as we have seen, neither when Bracton nor when Littleton wrote was the list of possible easements closed;[5] nor had the lawyers as yet begun to speculate much upon the characteristics of the easement. That there were certain definite rights of this character which one man could give another over his land was clear.[6] That those rights could be acquired by grant or prescription was also clear. But we do not find much positive doctrine as to the nature of the rights. It was not clear, for instance, that there could not be an easement in gross.[7] Such learning as we do find upon the subject is generally connected with proceedings for nuisance—in this period the assize of nuisance,[8] and later the action on the case for nuisance;[9] or sometimes with the other real actions which lay for the infringement of easements and other incorporeal rights;[10] or with actions of trespass [11] or novel disseisin [12] taken against persons who had interfered with an easement, and justified

[1] The oldest definition of an easement is perhaps to be found in *Termes de la Ley;* at p. 284 it is defined as, "a privilege that one neighbour hath of another by writing or prescription without profit, as a way or a sink through his land or such-like;" but neither the term nor the definition appear in the older editions of the treatise; in the later editions where it appears it is adapted from Kitchin, Courts (1580) f. 105b, to which reference is made; the term is used in Bracton's Note Book case 720, and in Y.B. 19 Ed. III. (R.S.) 342.

[2] Vol. ii 283-284.

[3] See Bk. iv Pt. II. c. 1 § 9; and cp. Williams, Institutes of Justinian illustrated by English Law 80-88.

[4] For this rule see below 156-157.

[5] Vol. ii 262, 580.

[6] See Madox, Form. no. 217 (grant of water rights); Rievaulx Cart. (Surt. Soc.) 207; Y.B. 18, 19 Ed. III. (R.S.) 298 (right of way).

[7] Y.B. 19 Ed. III. (R.S.) 342; in Y.B. 11 Hy. IV. Mich. pl. 12 "un chymin en gros per especialty" appears to be contemplated; for the growth of the modern rule see below 156-157.

[8] See e.g. Y.B. 20 Ed. III. (R.S.) ii 148-153; cp. Bracton f. 221a.

[9] For the growth of the action on the case see Bk. iv Pt. II. c. 1 § 9.

[10] As to these see above 19-20.

[11] Y.B. 6, 7 Ed. II. (S.S.) 1, 2.

[12] Ibid 76.

their interference by claiming that they were only abating a nuisance. It was through these actions that the law arrived at assured conclusions both as to what were the natural rights incident to ownership,[1] and as to what were the respective rights of the dominant and servient owners where an easement existed.

A man may use his property as he pleases, provided that he does not infringe the natural rights of others by causing a nuisance. Even if the user of his property causes damage to others he will not be liable to proceedings for a nuisance, provided that his acts are not prohibited by the law.[2] Thus a plaintiff who complained of a nuisance in that his neighbour had built a house on his (the neighbour's) ground which darkened the plaintiff's windows and rendered his house more difficult of access, found that he had no cause of action.[3] "A man," said Choke, "has no need to prescribe for things which are of common right, as to distrain for rent, service, etc.; or if I should prescribe, when a man builds a house so that from the house the water runs on to my land, that I can abate that which causes the water to run on my land, such prescription is void; for by the common law I can do this well enough."[4] If a man has granted an easement to another over his property he (the grantor) may use his property as he pleases, provided that he causes no nuisance either by infringing the natural rights of others, or by infringing the rights of the person entitled to the easement.[5] Thus, from the point of view of the person entitled to the easement, a test is supplied as to the extent of the right conferred. The person entitled may enjoy his right freely; but he cannot complain unless the servient owner has done something which, having regard to the existence of the right, amounts to a nuisance.

An easement is, from the point of view of the dominant owner, a right of property; from the point of view of the servient owner a limitation upon a right of property. Both the extent of

[1] For instances see Y.BB. 11, 12 Ed. III. (R.S.) 464-470; 30, 31 Ed. I. (R.S.) 40; 33-35 Ed. I. (R.S.) 456; 18 Ed. III. (R.S.) 210.

[2] "Licitum est enim unicuique facere in suo, quod damnum injuriosum non eveniet vicino, ut si quis in fundo proprio construat aliquod molendinum, et sectam suam et aliorum vicinorum substrahat vicino, facit vicino damnum et non injuriam: cum|a lege vel a constitutione prohibitus non sit, ne molendinum habeat vel construat," Bracton f. 221a; but Bracton sometimes darkens counsel by calling these natural rights servitudes imposed by law—"item a jure imponitur servitus prædio vicinorum, s. ne quid stagnum suum altius tollat per quod tenementum vicini submerget," f. 221a; see also f. 232a.

[3] Y.B. 7 Ed. III. Mich. pl. 25.

[4] Y.B. 8 Ed. IV. Pasch. pl. 14; for the meaning of the phrase "things of common right" see below 168-169; cp. Y.B. 6, 7 Ed. II. (S.S.) 77 *per* Bereford, C.J., who asserts what is in substance a natural right to abate injuries to the freehold.

[5] "Nocumenta vero infinita sunt, secundum quod inferius dicetur, quæ omnino servitutes tollunt, vel saltem impedimentum dant quo minus commode uti possit servitutibus," Bracton f. 231b.

the right thus conferred upon the dominant owner, and the limitation thus imposed upon the general right of property belonging to the servient owner are ascertained by the same tests as are employed to ascertain the limitations upon the natural rights involved in ownership. This principle, recently asserted by the House of Lords in the case of the easement of light,[1] is as old as the Year Books. But both Bracton[2] and the Year Book cases show that the similarity of the remedy for certain infringements of the natural rights of property, to the remedy for infringements of the rights conferred by easements, tended to cause some confusion between easements and natural rights. Thus Markham, in a case of Henry VI.'s reign,[3] said, "If a man builds a house and stops up the light coming to my house, or causes the rain to fall from his house and so undermines my house, or does anything which injures my free tenement, I shall have the assize of nuisance;" and Moile said, "If I have a way appendant to my land over your land and you obstruct the road so that I cannot use my way, I shall have against you the assize." It is clear that no distinction is drawn between natural rights and easements, because, in considering the nature of the remedy, it was not necessary to draw a distinction. We shall see that, for this reason, it was long before the law attained a clear distinction between these two classes of rights; and that this was no small impediment to the growth of a clear and consistent definition of the juridical character of an easement.[4]

On the other hand, it is probable that the modern rule that there cannot be an easement in gross[5]—a rule, as we have seen, not clearly recognized at this period[6]—is due in part to another characteristic of the assize of nuisance. The assize, as we have seen, only lay for a freeholder against a freeholder.[7] It is true that in a case of 1346 an easement in gross seems to be contemplated;[8] but it is clear that the person entitled to it had no remedy for disturbance by the assize unless he could show that such disturbance interfered with his free tenement.[9] "Put the

[1] Colls v. Home and Colonial Stores [1904] A.C. 179, 186, 197; cp. Higgins v. Betts [1905] 2 Ch. at pp. 214-215 *per* Farwell, J.

[2] Above 155 n. 2.

[3] Y.B. 22 Hy. VI. Mich. pl. 23; cp. Y.B. 30, 31 Ed. I. (R.S.) 22.

[4] Bk. iv Pt. II. c. 1 § 9.

[5] Ackroyd v. Smith (1850) 10 C.B. at p. 180; Rangeley v. Midland Railway Company (1868) L.R. 3 Ch. at pp. 310, 311; the rule does not of course apply to customary rights in the nature of easements, for these rights and distinction between them and easements see Bk. iv Pt. II. c. 1 § 9.

[6] Above 154.

[7] Above 11.

[8] Y.B. 19 Ed. III. (R.S.) 342 *Sharshulle* says, "Assize of nuisance lies only for that which is appendant, for it does not lie to have an easement in gross except by specialty."

[9] "Cannot one have," says *Sharshulle*, "a way even without any land, and can he not have an assize in respect of that way? Suppose then that you had a way by

case," said Sharshulle in 1349, "that I grant you a way over my land by specialty to such a mill, and at this time you are not seised of the mill, but you purchase the mill afterwards; I say that, though I disturb your user of this way afterwards, you would not be able to have the assize, but it would be necessary for you to have recourse to your writ of covenant."[1] It may be that, though the remedy by the assize became obsolete, this condition precedent for obtaining a remedy was remembered, and, changing somewhat its shape, hardened into the fixed rule of substantive law that all easements must be appurtenant.[2] It was the easier to reach this conclusion because Bracton had held that these servitudes were all of a prædial character.[3] His view thus led to a result similar to that reached by the procedural rules as to the assize. But it was probably these procedural rules which were the decisive cause of our modern rule; and in support of this view it may not be perhaps quite irrelevant to note that many of the various "profits," disturbance of which was remedied, not by the assize of nuisance but by the novel disseisin, can be enjoyed in gross.

Neither this nor many other questions relative to these easements were settled at this period. The principles which Bracton drew from Roman law had not as yet been naturalized. But these mediæval developments illustrate the manner in which the modern law will eventually be constructed, partly from Roman rules and principles and partly from a series of deductions from the common law remedies for the infringement of these rights.[4]

Covenants Annexed to the Land[5]

An easement is a right attached to a dominant tenement. It goes with that tenement, and can be exercised by any one who comes to the possession of that tenement whether or not such

grant from me where you had no freehold, and afterwards purchased land, would you not have an assize by reason thereof?" ibid.

[1] Y.B. 21 Ed. III. Hil. pl. 5.

[2] Y.B. 5 Hy. VII. Mich. pl. 15 *Fairfax* says, "Si un ad un voie appendant a son manoir ou a son meason per prescription ce voie ne poit estre fait en gros per ce que nul home poit prendre profit de cel voie sinon qu'il ad le manoir ou le meason a ce que le voie est appendant;" the old rule said that only a freeholder could sue; the new rule eventually took the form that only the freeholder could use; but partly owing to the procedural change brought about by the substitution of the action on the case for nuisance for the assize, partly owing to the long continued confusion of easements with customary rights in the nature of easements, it was long before the rule was definitely ascertained.

[3] "Servitutes vero ratione tenementorum a quibus debentur, et semper consistunt in alieno, et non in proprio, quia nemini servire potest suus fundus proprius; et nullus hujus modi servitutes constituere potest, nisi ille quod fundum habet et tenementum, quia prædiorum aliud liberum, aliud servituti suppositum," f. 220b.

[4] Bk. iv Pt. II. c. 1 § 9.

[5] On the whole of this subject see Holmes, Common Law, Lecture XI.

person succeeds to the actual estate in the land to which the easement was first annexed. Suppose, for instance, that A, tenant in fee simple, acquires a right of way over the land of B. Not only will X, who purchases A's estate be entitled to the easement, but also A's tenants, or A's lord who takes by escheat. As a general rule a covenant binds only the parties to it or their representatives. But the mediæval land law recognized certain covenants which had a wider operation. They were regarded as being in a sense annexed to an estate in the land, so that they could be enforced by any one who took that estate in the land. In this respect they have some analogy to easements. They differ from easements in that they can be enforced only by the person who has the same estate as the original covenantee. "If," says Coke,[1] "a man hath a warranty to him, his heirs and assigns and he make a lease for life or a gift in tail, the lessee or donee shall not vouch as assignee, because he hath not the estate in fee simple whereunto the warranty was annexed." In the case put above it would only be the person who took A's actual estate who could enforce such a covenant made with him. Neither his tenants nor his lord who took by escheat could enforce it.[2] At law, therefore, covenants do not run with the land: they run with the estate in the land to which they are annexed. The conception of covenants running with the land is a later conception due to equity; and, because these covenants running with the land in equity really run with the land, and not merely with an estate in it, they have many more of the characteristics of true easements than the covenants which run at law with an estate in the land.[3]

For the origin of these covenants thus annexed to an estate in land we must look at the old obligation of warranty. A warranty might be implied;[4] but, as we have seen, from a very early date express warranties were entered into with a view to securing greater freedom of alienation.[5] These warranties, if contained in a deed, could operate as covenants; and, though they operated as covenants, they, together with other covenants relating to the land, were still regarded as annexed to the estate in the land. During the course of the sixteenth and seventeenth centuries

[1] Co. Litt. 385b.

[2] Chudleigh's Case (1589) 1 Co. Rep. 122b (cited Holmes, op. cit. 399), "Always the warranty as to voucher requires privity of estate to which it was annexed. . . . But of things annexed to land it is otherwise, as of commons, advowsons, and the like appendants or appurtenances. . . . So a disseisor, abator, or intruder, or the lord by escheat, etc., shall have them as things annexed to land. So note a diversity between a use or warranty, and the like things annexed to the estate of the land in privity, and commons, advowsons and other hereditaments annexed to the possession of the land."

[3] Maitland, Equity 169-170.

[4] Below 160, 230.

[5] Above 105-106.

these old warranties implied or express gave way to the modern covenants for title. The old warranties having disappeared, the law was concerned only with covenants annexed to the estate in the land; and so the modern law as to these covenants is gradually built up. At this point I shall deal with the history of these covenants in the case of a conveyance of land in fee simple. The analogous subject of covenants running with the estate in the land or the reversion as between landlord and tenant I shall deal with in the next Book of this History, as the principles of this branch of the law were not settled till the sixteenth century.

At this point, then, we must consider (1) how far, on a conveyance in fee simple, could (i) the benefit, and (ii) the burden of a covenant be made to run with the estate in the land; and (2) how far could a covenant be made to run with the reversion.

(1) *How far, on a conveyance in fee simple, could* (i) *the benefit, and* (ii) *the burden of a covenant be made to run with the estate in the land?*

For the origins of this branch of the law we must, as I have said, look to the old law of warranty.

A donee could enforce the obligation of a donor or his heirs to warrant his title either (*a*) by the process of vouching to warranty, or (*b*) by a writ of *Warrantia Cartæ*, or (*c*) by using this obligation as a defence or rebuttal. (*a*) If B claimed to be entitled to land in the possession of A, A, instead of defending the action for himself, might vouch his donor C to warranty.[1] C, on being vouched, might either deny his obligation to warrant, in which case he was said to counterplead the warranty; or he might defend the action; or he might vouch a third person. If C failed in his duty of warranting A's title, and A in consequence lost his lands, C must restore to A lands of equal value. Thus we get a procedure applied to actions for land very similar to that which, in Anglo-Saxon times, was applied to actions for chattels,[2] and to that which in Bracton's day was applied to the appeals of robbery or larceny.[3] It probably, as Maitland has pointed out, is based on the same primitive order of ideas according to which a plaintiff is concerned rather with tracing out a wrongdoer than of deciding a question of title.[4] But, as failure

[1] For a full account of this process see P. and M. ii 659-660.

[2] Vol. ii 112-114.

[3] Below 320.

[4] "Now it is said that in remote times the only action for land was, like the old *actio furti*, a punitive action; it aimed at a *wite* as well as at restoration. The plaintiff desired, not merely to recover his land, but to attack the original wrongdoer who took his land away from him. Thus the process of voucher was at first a process which in the interest of plaintiffs strove to bring before the court the real offender in order that he might pay for his offence," P. and M. ii 660.

to fulfil a duty to warrant might involve specific restitution, it must be regarded as intimately related and supplementary to the real actions. (*b*) In certain actions, e.g. in the assizes, the dilatory process of vouching to warranty was not allowed.[1] In these cases if a feoffor had bound himself to warrant, or was under an implied duty to warrant, the feoffee could secure the fulfilment of this duty by writ of *Warrantia Cartæ*, by means of which he could likewise recover land of equal value.[2] (*c*) Lastly the obligation to warrant could be used as a defence or rebuttal. A warranty, as Coke said, arms the purchaser "not only with a sword by voucher to get the victory of recompense by recovery in value, but with a shield to defend a man's freehold and inheritance by way of rebuttal."[3] If A, a feoffee, were sued by the heir of a feoffor who had bound himself and his heirs to warranty, A could rebut the heir's claim by showing that the duty to warrant had descended upon him. In other words he could use the duty to warrant as a defence to an action brought against him.[4]

"In Bracton's day a tenant had as a general rule a right to call upon his feoffor, who would also be his lord, for warranty. He had this right if he had done homage to his feoffor, or if he had a charter of feoffment containing the usual formula *Sciatis me dedisse.*"[5] But we have seen that, to guard against the claims of the heir, or to give a larger scope to the persons entitled to or bound by the warranty, express warranties were frequently entered into.[6] The combined effect of the Statute de Bigamis[7] and the Statute Quia Emptores[8] made these express warranties essential on a conveyance in fee simple. The former statute enacted that if a gift were made to be held of the lord of the fee, or of persons other than the feoffor, and no express clause of warranty was inserted, only the feoffor and not his heirs were impliedly bound to warrant.[9] But the result of the Statute Quia Emptores was that all land given in fee simple was held, not of the feoffor, but of his

[1] F.N.B. 134 D.

[2] Whether the "veroi value de la terre perdue en deners" or "terre pour terre," i.e. land of equal value, was recoverable by this writ was a matter of doubt at the beginning of the fourteenth century, Eyre of Kent (S.S.) ii 207 *per* Spigurnel, J.

[3] 10 Co. Rep. Pref.

[4] P. and M. ii 310-311; in later law very fine distinctions were drawn between cases where a man, though he could not vouch, yet could use the obligation of warranty as a rebuttal, Co. Litt. 385b.

[5] P. and M. ii 660.

[6] Above 105-106.

[7] 4 Edward I. st. 3 c. 6.

[8] 18 Edward I.

[9] "Ubi autem (in cartis) continentur (Dedi et Concessi, etc.) tenendum de capitalibus dominis foedi; aut de aliis quam de feoffatoribus, vel haeredibus suis, nullo servitio sibi retento, sine homagio vel sine dicta clausula warrantiae, haeredes sui non teneantur ad warrantiam. Ipse tamen feoffator in vita sua ratione doni proprii tenetur warrantizare;" the force of the word "dedi" was recognized in the grant of an annuity in Y.B. 6, 7 Ed. II. (S.S.) 119, 120; Coke, Second Instit. 275-277; this implied warranty was abolished in 1845, 8, 9 Victoria c. 106 § 4.

lord.[1] Therefore express covenants of warranty became necessary to secure the estate of the feoffee. Hence these express covenants of warranty became almost universal. Therefore the question, how far their benefit or burden could be made to run with the estate in the land, was a question of the greatest practical importance.

(i) Benefit.

These covenants could be used either as a warranty, i.e. the person entitled to the benefit of the warranty could by the process of voucher or by writ of *Warrantia Cartæ* get lands of equal value; or they could be used as a covenant on which an action for damages could be brought.[2] In either case they were annexed to the estate in the land, and could be enforced by persons other than the original feoffee with whom they were made. Thus if A enfeoffed B and his heirs of land, and covenanted to warrant their title, either B or his heirs could call upon either A or his heirs to fulfil this obligation. Moreover, if A's covenant were to B and his heirs and assigns, not only B but any person who became entitled to the estate in the land as B's assign was able to sue if B's heirs failed.[3] Later the assign could sue the original grantor whether or no the heirs of his grantor had failed.[4] Possibly this was the result of the Statute Quia Emptores. As we have seen, that statute made the mention of assigns as well as heirs unnecessary when a grant in fee simple was made, because the statute allowed assignment, and put the alienee into the place of the alienor.[5] It was only natural therefore to give the assign a right of recourse directly against the original grantor. The explanation which Bracton gives of this fact is that the assign comes in because he is named as a quasi-heir. He explains it by the analogy of succession; and it was probably because this analogy

[1] Above 80.

[2] "By a writ of covenant a demandant can recover naught but damages only, while this writ of warranty of charter is given in lieu of a voucher, by which he can recover land to the value of the land he has lost," the Eyre of Kent (S.S.) ii 207 *per* Spigurnel, J.

[3] For an early case in which an assignee sued see Bracton's Note Book, Case 804; it is not there stated whether or not the heirs of the donee had failed.

[4] Y.B. 14 Hy. IV. Mich. pl. 6 (p. 5); Holmes, Common Law 374, 375; the extent of the grantor's liability to the assignee is perhaps a little doubtful in Edward I.'s reign, Y.B. 20, 21 Ed. I. (R.S.) 232, 234; it is clear enough in Edward III.'s reign Y.BB. 13, 14 Ed. III. (R.S.) 24 *per* Sharshulle, J.; 18 Ed. III. (R.S.) 440, 442; Co. Litt. 384b; but apparently the use of the term "assigns" was still necessary if the covenant was to have the effect of a warranty, i.e. to render the warrantor liable to give lands in recompense; otherwise if it was to take effect simply as a covenant which ran with the land, i.e. to render the covenantor only liable for damages, Co. Litt. 384b, 385a; Y.B. 50 Ed. III. Trin. pl. 2; in Y.B. 3, 4 Ed. II. (S.S.) 11 it was held that the measure of damages was the value of the land at the time when the warranty was given, not its value at the time when the litigation arose.

[5] Above 106-107. Holmes suggests this explanation without adopting it, Common Law 375 n. 1.

was used that assigns must be named if they were to be able to make use of the covenant as a warranty which would enable them to recover lands of equal value, and not merely as a covenant which would only enable them to recover damages.[1] But a right of this kind which was in a manner attached to an estate in land looked rather like an easement; and it could equally well be explained on this analogy. Hence it came to be said that such a covenant ran with the estate in the land, on the analogy of an easement; and, if we adopt this analogy, there will be no need to mention assigns, because the land will pass to the assignee with its appurtenances whether or no they are named in the grant. Hence, whether or no assigns are named, they can sue on such a covenant annexed to the land and recover damages. This mode of regarding the matter comes out clearly in the much discussed case of *Pakenham*.[2] Pakenham sued a prior for breach of the prior's covenant made with Pakenham's great-grandfather that the prior and convent should celebrate divine service weekly in his chapel. The plaintiff claimed not as heir but as assignee; and it was held that he was entitled to recover—"he is tenant of the land, and it is a thing which is annexed to the chapel, which is in the manor, and so annexed to to the manor." Similarly it was held in 1582 that where A had enfeoffed B in return for certain services, and granted that if the feoffee his heirs or assigns were distrained for greater services, he (the feoffee) his heirs or assigns could levy a distress in A's manor, the assign of B could take advantage of the covenant.[3]

It is clear from *Pakenham's Case* that the covenantor need not necessarily be connected with the land.[4] In that case the prior was a stranger; and this was one of the cases cited by Coke to illustrate his remark that "a covenant is in many cases extended further than a warranty."[5] But as early as 1401 it was recognized that the assign must, to enable him to sue, have the land to which the covenant was annexed.[6] An assign cannot,

[1] Above 161 n. 4.

[2] Y.B. 42 Ed. III. Hil. pl. 14; Holmes, Common Law 395-398; cp. Y.B. 45 Ed. III. Mich. pl. 7 (covenant to pay rent); Dyer at f. 42b, "the feoffee . . . has a fee simple in the warranty as he has in the land."

[3] Moore 179—"Le Court dit que cy, pur ceo que le covenant trencha ove les terres: et si le parole 'assignes' ne fuisset eins tamen le parole 'heires' voiloit garranter le distress al assignee *per* Pirryam Justice."

[4] See 1 S.L.C. (10th ed.) 72-73.

[5] "And note there is a diversity between a warranty that is a covenant real, which bindeth the party to yield lands or tenements in recompense, and a covenant annexed to the land, which is to yield but damages, for that a covenant is in many cases extended further than the warranty," Co. Litt. 384b.

[6] Y.B. 2 Hy. IV. Mich. pl. 25 (p. 6); Holmes, Common Law 398, 399; Spencer's Case (1583) 5 Co. Rep. at f. 18a—"but if such covenant were made to say divine service in the chapel of another, then the assignee shall not have an action of covenant, for the covenant in such case cannot be annexed to the chapel, because the chapel doth not belong to the covenantee, as is adjudged in 2 H. 4, 6."

like an heir, rely on the privity of contract: he can only rely on privity of estate.[1] Hence we get the modern rule that the benefit of covenants made with the purchaser of land will, if they relate to the land, run with that purchaser's estate in the land, that is they can be enforced by successive tenants of that estate.[2] It was partly this settlement of modern rule as to the conditions under which the benefit of covenants will run with the estate in the land, and partly the inconvenience of the procedure available to enforce a warranty,[3] which has led to the substitution of the modern covenants for title for the old warranties express or implied. In the course of the sixteenth and seventeenth centuries covenants for seisin,[4] for the right to convey,[5] for quiet enjoyment,[6] for freedom from incumbrances,[7] and for further assurance,[8] became usual covenants on a conveyance of land. They are at the present day by far the commonest class of covenants, the benefit of which runs with the estate in the land.[9]

(ii) Burden.

Whether or not the burden of a covenant made by a purchaser of land could be annexed to it so as to run with the land was long an unsettled question. Bracton[10] seems to think that land might be so bound to warranty that the burden of warranty would pass to the assignee of the land. This would imply that a man might by a covenant bind his land and subject it to something very like an easement. Probably such covenants were rare. The

[1] See Lewes v. Ridge (1601) Cro. Eliz. 863.

[2] 1 S.L.C. (10th ed.) 72.

[3] That procedure was intimately bound up with the procedure in the real actions and was open to objections similar to those which proved fatal to them.

[4] An instance of this covenant will be found in Gray v. Briscoe (1607) Noy. 142; for the covenant see Platt, Covenants 306-307; the vendor covenanted that he was seized of "the very estate both in quantity and quality that he purports to convey;" it fell into disuse because, when limitations to uses to bar dower became usual, conveyances were made under powers operating under the Statute of Uses, Halsbury, Laws of England xxv 463 n. (*f*).

[5] Trenchard v. Hoskins (1621) Litt. 62.

[6] Grenelife v. W. (1539) Dyer 42—on a sale of copyholds; Mountford v. Catesby (1574) Dyer 328a—on a lease for years.

[7] Hamington and Ryder's Case (1588) 1 Leo. 92; Lewes v. Ridge (1601) Cro. Eliz. 863.

[8] Pudsey v. Newsam (1603) Yelv. 44.

[9] Middlemore v. Goodale (1639) Cro. Car. 503; 1 S.L.C. (10th ed.) 72.

[10] ff. 382, 382b, "Non solum obligatur persona feoffatoris . . . poterit etiam tenementum obligari. . . . Sed quid si tenementum sic obligatum tacite vel expresse, propter defectum vel propter delictum feoffatoris tanquam escheata, deveniat in manum domini regis vel capitalis domini superioris? Quaero an ille teneatur ad warrantiam cum ad warrantum vocetur. Et videtur quod sic, quia res cum onere transit ad quemcumque;" the case cited for this in Bracton's Note Book is case 748; Fleta II. 23. 19 lays down the law in the same way; cp. Holmes, Common Law 395; it will be observed that this goes further than the cases which establish the converse proposition, as the lord is not in of the same estate as the warrantor: the analogy with the easement is more complete, above 158.

more usual case would be where land was charged with rent, which, as we have seen, was regarded as an independent incorporeal hereditament, or with other services, which were similarly regarded.[1] Any covenants which fettered the freedom of alienation would probably have been held to be void as inconsistent with the nature of the estate granted.[2] In fact the power to burden the land by such covenants seems to be negatived by the dictum laid down in a Year Book of Edward I.'s reign to the effect that "No one can bind his assigns to warranty, because the burden of warranty always extends only to heirs who claim by succession, and not to those who claim by assignment."[3] And it should be noted that, if a feoffee vouched his feoffor to warranty, or sued him by a writ of Warrantia Cartæ he could only get such lands as the feoffor had at the date of the purchase of the writ.[4] There is nothing in Coke's commentary which gives colour to the view that the burden of such covenants could be annexed to the land, though he has much to say of the manner in which these benefits might be so annexed. Holt, C.J., was clearly of the opinion that the burden could not be annexed to the land, for he decided that, though land might be charged with a rent, it could not be bound by a covenant.[5]

This conclusion is clearly in accordance with the principles of our modern land law. To allow the burden of a covenant to be attached to the land would be tantamount to allowing landowners to subject it to something very like an easement; and it is well settled that it is not possible for landowners to create new easements at their will and pleasure.[6] Moreover, such a covenant would obviously tend to restrict free alienation, and so would infringe the policy of the modern rule against perpetuities.[7] It is therefore not surprising that in 1885 the court of appeal in the case of *Austerberry v. Corporation of Oldham*[8] decided that the

[1] Above 151; below 168; this point of view comes out clearly in Y.B. 6, 7 Ed. II. (S.S.) 185-187.

[2] Above 85.

[3] Y.B. 32, 33 Ed. I. (R.S.) 516; it appears, however, to have been thought by Bereford, C.J., in 1312 that a covenant made by a husband by fine on the conveyance of land would bar his wife's dower, Y.B. 5 Ed. II. (S.S.) 83, 84.

[4] "The defendant shall have in value of the lands against the vouchee which he had at the time of the purchase of his *Warrantia Chartæ*, and therefore it is good policy to bring his *Warrantia Chartæ* against him before he be sued, to bind the lands of the vouchee which he had at that time," F.N.B. 134 K; if he had no lands the plaintiff got damages, Y.B. 29 Ed. III. pp. 3, 4 cited F.N.B. 134 K n. (a).

[5] Brewster v. Kitchell (1697) 12 Mod. 166; for a full discussion of this case and the subject generally see 1 S.L.C. (10th ed.) 76-85; the view there taken as to the interpretation of Holt's words is supported by Lindley and Fry, L.JJ., in Austerberry v. Corporation of Oldham (1885) 29 C.D. at pp. 782, 785.

[6] Keppel v. Bailey (1835) 2 M. and K. 517.

[7] L.S.W.R. v. Gomm (1882) 20 C.D. 562; for the history of the rule against perpetuities see Bk. iv Pt. II. c. 1 § 6.

[8] 29 C.D. 750.

burden of covenants relating to the land could not be annexed to it. "I am not," said Lindley, L.J.,[1] "prepared to say that any covenant which imposes a burden upon land does run with the land, unless the covenant does, upon the true construction of the deed containing the covenant, amount to either a grant of an easement,[2] or a rent charge, or some estate or interest in the land."

(2) *How far could a covenant be made to run with the reversion?*

With this question I can deal much more briefly. Though the analogy of the easement enabled certain kinds of covenant to run with the estate in the land, this analogy could not be invoked to enable them to run with the reversion. Before the Statute of Quia Emptores it may be doubted whether an interest like a reversion could be regarded as a sufficiently definite thing to allow a covenant to be annexed to it—it would probably have been regarded as too indefinite in its nature.[3] After Quia Emptores there was no reversion after a grant in fee simple. The covenant therefore could only bind the covenantor or his heirs. On the other hand there can be a reversion after the grant of an estate less than an estate in fee simple. In the case of these estates therefore the question arises whether and under what conditions covenants could run with the reversion. But in such cases the tenant holds of the reversioner, so that the law applicable to these covenants depends upon the rules as to the conditions under which covenants will run with the estate in the land or the reversion as between landlord and tenant. We shall see in the following Book that these rules have had a history which is different from the rules which have just been discussed, and that, in consequence, the modern law on this subject is also different.

In these ways and by these means, the law by sometimes using the analogy of easements, sometimes the analogy of succession, arrived at the conception of covenants running with the land as between the vendor and purchaser of an estate in fee simple. The possibility of making such covenants will do a little to restore

[1] 29 C.D. at p. 781.

[2] For cases in which this construction has been put upon a covenant see Holmes v. Seller (1692) 3 Lev. 305; and cp. Rowbotham v. Wilson (1860) 8 H.L.C. at p. 362 *per* Lord Wensleydale.

[3] Y.B. 21, 22 Ed. I. (R.S.) 326, *Howard arg.*, says, "Rent is a gross issuing out of the freehold; and he demands it as an accessory appendant to a gross; and we do not think that the rent which is a gross thing can be accessory to another gross;" Co. Litt. 47a, 121a, "A thing corporeal cannot properly be appendant to a thing corporeal, nor a thing incorporeal to a thing incorporeal;" for the later law on this subject see 1 S.L.C. (10th ed.) 89-91; it seems to have been modified in certain cases so as to allow a covenant to run with incorporeal hereditaments in cases arising as between landlord and tenant; possibly this is due to 32 Henry VIII. c. 34, see Martyn v. Williams (1857) 1 H. and N. at p. 829.

to landowners that freedom to determine the incidents of estates in the land which was largely restricted by the limitation of the number and quality of estates known to the law. More will be done later by equitable extensions of these doctrines.

Prescription[1]

English law knows no positive prescription for corporeal hereditaments. As we have seen, a person claiming a corporeal hereditament must allege that he or his predecessor in title was seised of the hereditament within the period allowed by the statutes of limitation for the time being in force. Unless he can show that he was thus seised within this period and that his seisin is older and better than that of the tenant, his claim fails, and, so far as he is concerned, the seisin of the tenant is indefeasible.[2] On the other hand, if a man can show either that he and his ancestors,[3] or that he and all those whose estate he has,[4] have enjoyed certain kinds of incorporeal hereditaments from before the time of legal memory, he gets a positive title to the hereditament claimed. This time of legal memory was fixed at the year 1189 by analogy to the period of limitation fixed for the writ of right by the statute of 1275.[5] In the case of corporeal hereditaments, therefore, the law merely provides a statute of limitations; in the case of certain kinds of incorporeal hereditaments it allows that length of user confers a positive title.

When Bracton wrote, the law on this subject was very different both in substance and form from what it afterwards became. This was due partly to the fact that the theory upon which prescription was then based was not the same as the theory upon which it has come to be based in the modern common law; and partly to Bracton's habit of using the language of Roman law. Possibly, as I have said, the principles of the modern common law would never have emerged if Bracton's successors had been as learned as himself in the civil and canon law.[6] But beneath the Roman phraseology we can see some of the germs of the later law.

In the first place we can see that a man may meet an action which questions his right to an incorporeal hereditament, like an

[1] See on this subject Salmond, Essays in Jurisprudence and Legal History, Essay II.

[2] Above 89-90.

[3] Used for a right in gross.

[4] "In a que estate," used for a right appurtenant or appendant.

[5] Above 8; P. and M. i 147; Litt. § 175; but Littleton, ibid, tells us that in the opinion of some the period for prescription was fixed by the common law so that that time was literally the "time whereof the mind of man runneth not to the contrary," and was independent of the statute of 1275; "and the rather in so much that the said limitation of a Writ of Right is of so long time passed;" but unfortunately this suggestion never materialized, see Bk. iv Pt. II. c. 1 § 9.

[6] Vol. ii 284.

easement or a right of common, by alleging seisin from before the time of legal memory,[1] or if he claims it he may rely upon a similar title. In the second place we can see that seisin of such an incorporeal hereditament for a very much shorter period may confer possessory rights. In this case exactly the same principles were applied to both corporeal and incorporeal hereditaments. If I have been in actual seisin of land or of a profit for a year, and I am ejected, I can bring an assize of novel disseisin and succeed in regaining possession—whatever may be the result of a writ of right or other more proprietary action.[2] But, as Sir John Salmond says,[3] "When in later times it became allowable to set up title in bar of a possessory action, this branch of the law fell into desuetude." The man who would recover his incorporeal hereditament must show seisin before the time of legal memory. Nothing less will suffice.

What then was the principle upon which seisin from before the time of legal memory conferred a positive title? To explain this we must bear in mind what has been said above as to the point of view from which the law regarded the power of the landowner to create interests in his land. We have seen that the man who, to use modern phraseology, limited an estate, was regarded as making a special law for that estate, differing from the ordinary law which would have governed it if it had not been thus limited.[4] A man who charged his land with rent, or who gave to a stranger a right of common, or who gave a neighbour a right of way, subjected his land to a special law in favour of the grantee. Such grantee, if his right was questioned, must show that he was entitled; and this he could only do in three ways. He might either produce the deed, the "specialty," by which this special law was made; or he could prescribe, i.e. show that he had enjoyed the right from time immemorial; or he could show that in the district in which the land was situated there was a special custom which entitled all persons in his position to the right claimed.[5] In all these three cases the claimant succeeded because he was able to set up a special law applicable to his case. The deed was conclusive. The user for so long a period was equally conclusive,

[1] P. and M. ii 141 and references to Bracton's Note Book there cited; Bracton f. 230, "Longum tempus qui excedit memoriam hominum."

[2] Y.BB. 21, 22 Ed. I. (R.S.) 422; 1, 2 Ed. II. (S.S.) 20; Eyre of Kent (S.S.) iii 130 n. 17; P. and M. ii 141.

[3] Op. cit. 110; vol. ii 354; above 9-10.

[4] Above 102-103.

[5] "A franchise of this kind may be claimed in various ways; by specialty, or by prescription of time, or as appendant, etc.," Y.B. 5 Ed. II. (S.S.) 143 *per* Malberthorpe *arg.*; cp. Y.B. 7 Ed. II. 212, "*Nota* en cas usage defait commune ley, que usage usee parmy le pais defait commune ley, mes usage de un ville ou de deux ne defait commune ley."

because no evidence from before the time of legal memory could be of any avail to show that the user was wrongful.[1] Custom, if proved, set up a special local law for the district which, if reasonable, might supersede the common law. Both custom and prescription set up a special law. The difference was that one was personal, the other local.[2]

That this conception of prescription as a personal law in favour of the person seised of a right from before the time of legal memory is correct, we can see from the rule that it was only things "against common right" which could be prescribed for. It is not all incorporeal things which could be prescribed for, because some of these things are recognized by the common law just in the same way as the ownership of corporeal things. Sir John Salmond has shown this very clearly.[3] "The ownership of a corporeal hereditament is a matter of common right; the ordinary incidents of the ownership of land are recognized by the common law. Therefore, in a plea of right for land, the claimant counted not of immemorial seisin, but merely of the seisin of himself as of fee and of right at such and such a time. Of incorporeal hereditaments, on the other hand, some are of common right and some against common right. Certain forms of services are recognized by the common law as possible incidents of freehold tenure, due by reason of that tenure from the tenant to the lord. Such services, of which the most important is rent service, are, therefore, of common right, and when a lord claimed them by a writ of customs and services, or avowed in replevin by reason of them, he alleged not immemorial seisin of them, but merely seisin of himself or his predecessors at the hand of the tenant or his predecessors. All other services, however, were against common right, and the claimant was required to allege seisin from before

[1] Bracton f. 230, "Item docere oportet longum tempus et longum usum, illum videlicet qui excedit memoriam hominum, tale enim tempus sufficiat pro jure, non quia jus deficiat, sed quia actio deficit vel probatio;" and this continued to be the view of the common law, see the Y.BB. cited 2 Rolle Ab. 268-269; cp. 20 Ed. III. (R.S.) i 342, "That which is before time of memory does not fall within the knowledge of anyone," *per* Thorpe *arg.*

[2] "And *nota* the difference between *prescription* which is made in the person of any, as he and all his ancestors, etc., or all those whose estate he hath, etc., and *custom* which lies upon the land, as *infra manerium talis habetur consuetudo, etc.*; and this custom binds the land, as gavelkind borough English and the like," Swayne's Case (1609) 8 Co. Rep. at f. 64a; cp. Salmond op. cit. 95, 96.

[3] Ibid 100-102; in Y.B. 32, 33 Ed. I. (R.S.) 264, *Bereford*, J., says "Since you affirm your estate by a custom, which custom is against common right, and which custom began by a tort, it is necessary, if you wish to prove your estate by that custom, that you should maintain it by long continuance of time;" see also Bereford's statement in Y.B. 6 Ed. II. (S.S) 102; Y.B. 3, 4 Ed. II. (S.S.) 65 *per* Malberthorpe *arg.*; and Choke's statement in Y.B. 8 Ed. IV. Pasch. pl. 14 cited above 155 n. 4; cp. Tennant v. Goldwin (1705) Salk. 360; we have seen above 155, that this was one of the ideas which helped to differentiate easements from natural rights.

the memory of man. . . . So, again, if the service claimed was that of suit at the mill of the claimant, the method of claim depended on whether he against whom it was made was the claimant's tenant or not. If he was, the service was of common right, and the claimant merely alleged seisin at the hands of his tenant or his ancestors. If he was not, the claim was against common right, and required to be supported by immemorial usage." On the same principle common appendant, being of common right, need not be prescribed for;[1] common appurtenant or in gross and easements, not being of common right, must be prescribed for.

In the Middle Ages some of the most important classes of incorporeal things were franchises. As we have seen, in Bracton's day these things could not be prescribed for.[2] Neither statute nor custom would bind the crown unless the crown was specially included; for the king is prærogative; and prescription being a special personal law, presumed from lapse of time in favour of an individual, could not avail against the king. The law was modified by the Statutes of Gloucester;[3] and in the case of certain franchises a prescriptive title was allowed to be good even against the crown.[4] But, subject to this limitation, all kinds of incorporeal things against common, right—profits as well as easements—could be prescribed for; and, as the communities of the land were definite enough for very various purposes, not only persons natural or incorporate, but also unincorporate communities could prescribe. Thus in 1305[5] Hugo and others, with the whole county and the king's tenants of the vill and land of Montgomery, sued E. de Mortuomari for that he had deforced them of their common of pasture in L., their free chase and fishery throughout the whole of Sabrina, and of all their streams in the lands of K., of which they had been seised from before the time of memory. The defendant did not appear. The assize confirmed the claim of the plaintiffs, and the court gave judgment that they do recover their seisin of their common, their chase, and their fishery.

But, before the end of the mediæval period, the theory upon which prescription was allowed to operate had changed. As the things against common right which could be prescribed for were normally created by a deed of grant, it came to be thought that prescription was based, not so much on a personal law in favour

[1] Above 149; but it must of course be proved, and in 1312 Bereford, C.J., ruled that it was not proved merely by showing seisin of it for twenty years, Y.B. 5 Ed. II. (S.S.) 150.

[2] Vol. i 87.

[3] Ibid 88, 89.

[4] But not in the case of franchises which required either a record or a charter made within time of memory to support them, Case of Abbot of Strata Marcella (1592) 9 Co. Rep. at ff. 27b, 28a; Bl. Comm. ii 265; cp. Salmond op. cit. 107 n. 1.

[5] Y.B. 32, 33 Ed. I. (R.S.) 519, 520.

of the person seised, as on the fact that such immemorial user was conclusive evidence of a grant made before the time of legal memory. This was a theory very different to the older theory; and it entailed different consequences. At the same time some of the rules which had sprung from the older theory still survived. The result was the creation of a body of somewhat arbitrary rules as to the persons who could and the persons who could not prescribe.

We have seen that on the old theory no prescription was possible as against the crown; but, on the newer theory, there could be no objection to such a prescription. However, we see traces of the older theory in the rules that certain franchises cannot be prescribed for.[1] On the other hand the newer theory proved fatal to the claims of unincorporate communities to prescribe for profits a prendre. Such communities may indeed avail themselves of a customary right in the nature of an easement; but they cannot prescribe because they cannot take a grant; and, as profits a prendre cannot be claimed by custom, they cannot claim rights of this kind. Both the old and the new theory prevented tenants for limited interests from prescribing in their own names; for on either theory prescription is use from before the time of legal memory; and, as Blackstone puts it,[2] "it is absurd that they should pretend to prescribe, whose estates commenced within the memory of man."

These conclusions were in course of formation in Edward IV.'s reign. Inhabitants, it was said, were in the position of tenants at will, and could not therefore prescribe for a profit,[3] though they could establish a right of way by custom.[4] On the other hand it seems to have been thought that a tenant for a definite limited interest could prescribe.[5] But it was stated in 1553 in the case of *Withers v. Iseham* that neither an unincorporate body of men nor tenants for a limited interest could prescribe;[6] and this was finally accepted as settled law in 1607 in *Gateward's Case*[7]—probably in part from motives of public policy.[8] But this

[1] Above 169 n. 4.

[2] Comm. ii 265.

[3] Y.B. 15 Ed. IV. Trin. pl. 7 *per* Pigot.

[4] Ibid, *per* Brian; see also Y.B. 18 Ed. IV. Pasch pl. 15.

[5] "Mon verey tenent poit prescriber en son droit demesne, et tenant pur term d'ans auxi *quod fuit concessum*, mes le Seigneur tout temps doit prescriber pur son tenant a volunte," Y.B. 15 Ed. IV. Trin. pl. *per* Choke.

[6] "A tenant at will, or for years, or life cannot prescribe in their own names to have common from the weakness of their estates. The inhabitants of a town, being tenants at will, could not prescribe to have common in the waste, etc., because, in their persons, there is no such ability or capacity, without being a corporation; but they may prescribe for a way to church or to grind toll free which are only easements," Dyer at 71a.

[7] 5 Co. Rep. 59b.

[8] "No improvements can be made in any wastes if such custom should be allowed for tenants for life, for years, at will, tenant by elegit, statute staple, and statute merchant," ibid at ff. 60a, 60b.

rule was productive of some injustice in that it tended to defeat customary rights of the inhabitants of districts which may well have dated long before the establishment of these rules of the common law.[1] This consequence of this new theory of prescription had been seen as early as Edward IV.'s reign; and in our modern law the courts have been astute to evade its consequences by methods somewhat resembling those indicated in the Year Book of Edward IV.[2]

These rules show us that by the end of the mediæval period the main characteristics of prescription at common law have been reached. Prescription is a mode of acquiring certain incorporeal hereditaments by user from before the time of legal memory. Such user has this effect because it supplies the place of a lost grant; and since it operates in this way no prescriptive title can be acquired unless a grant of the thing was legally possible.[3]

§ 8. Inheritance

The fully developed common law knew seven rules which regulated the descent of estates in fee simple in lands held by free tenure.[4] (1) Inheritances lineally descended to the issue of the person last seised *in infinitum*, but never lineally ascended. (2) Male issue were admitted before female. (3) When there were two or more males in equal degree the eldest only inherited, but the females inherited together. (4) The lineal descendants *in infinitum* of any person deceased represented their ancestor. (5) On failure of lineal descendants of the person last seised the inheritance descended to his collateral relatives being of the blood

[1] "It is agreed that this common cannot be good by prescription. . . . In ancient times such grants might be, as to the inhabitants, etc., which were then allowed good, as the grant of the isle of Wrexham, but such grants would not be good at this day," *per* Treby, C.J., Weekly v. Wildman (1699) 1 Ld. Raym. at p. 407.

[2] Y.B. 15 Ed. IV. Trin. pl. 7—*Littleton* put the case of prescription by a sheriff for a payment from a certain vill; no, said Choke, the sheriff could not prescribe because he is only tenant at will; but lay the prescription in the crown to the use of the sheriff for the time being; *Littleton* also said, "Moy semble que le prescription poit estre fait en auter maner et forme, come adire, que il ad este use de temps d'ont memory ne curt deins le City de Coventry, que les citizens et inhabitants deins mesme le Cite duissent cominer en mesme la lieu . . . issint que l'effect del plea serra sur le use;" cp. this last statement with Goodman v. Mayor of Saltash (1882) 7 A.C. 633, where it was presumed that the grant of a profit a prendre had been made to the corporation on trust for the inhabitants; Lord Blackburn pointed out in his dissenting judgment that such a trust was not historically probable; but the Y.B. shows that the idea of a use or trust in this connection was not quite new; in fact, that property could be held to the use of parishioners was laid down as good law by Fineux, C.J., in Y.B. 12 Hy. VII. Trin. pl. 7 p. 29; but in Lord Chesterfield v. Harris [1908] 2 Ch. at p. 433 it was pointed out by Buckley, L.J., that in Goodman v. Mayor of Saltash this presumption of a trust was made to aid a prescriptive right claimed in gross, and not to aid a prescriptive right claimed as appurtenant to land; and the same remark applies to the case put by Littleton.

[3] Bl. Comm. ii 265.

[4] Ibid c. 14.

of the first purchaser, subject to rules (2), (3), and (4). (6) The collateral heir of the person last seised must have been his next collateral kinsman of the whole blood. (7) In collateral inheritances the male stocks were preferred to the female, unless the lands had in fact descended from a female.

Most of these rules were ascertained in this period. Some of them are obvious and call for no comment. The rule, for instance, that the land in the first place descends is the "natural" rule;[1] and the rule that makes the person last seised the stock of descent follows from the position of importance assigned to seisin in the mediæval common law.[2] Most of these rules are not so obvious, and can only be explained by history. In dealing with this history I shall divide the subject as follows:—(1) The preference of males to females; (2) The rules of primogeniture and coparcenary; (3) The rule of representation; (4) The exclusion of ascendants; (5) The inheritance of collaterals; (6) The position of the half blood.

(1) The preference of males to females.

Even before the Conquest the preference of males to females was the rule. "This precedence is far older than feudalism, but the feudal influence made for its retention or resuscitation."[3] At the same time, it is clear that as early as the reign of Henry I. women could inherit after men.[4] We shall see that this preference holds good not only in the descending, but also in the ascending line; and that, after some controversy, it has been applied to ascertain the order in which the remotest collateral is entitled to inherit.[5]

(2) The rules of primogeniture and coparcenary.[6]

There seems to be little doubt but that the rule of primogeniture was a rule which was at first applied to military fiefs.[7] It was to the interest of the lord that such fiefs should be impartible. Thus we find that all over Europe there was a movement in the eleventh and twelfth centuries in favour of the impartibility of these fiefs, and, consequently, in favour of the rule that they should go to the eldest son.[8] Obviously it was easier for the lord to get his

[1] P. and M. ii 258, "The preference of descendants before all other kinsfolk we may call natural, that is to say, we shall find it in every system that is comparable with our own."

[2] Above 91-92; there is a good illustration of this rule in Y.B. 5 Ed. II. (S.S.) (1312) 246 in an action brought on a writ of cosinage.

[3] P. and M. ii 259; Vinogradoff, English Society 253.

[4] P. and M. ii 260; Henry I.'s Charter § 3.

[5] Below 183.

[6] P. and M. ii 260-276.

[7] Thus in 1312-1313 Bereford, C.J., ruled that if land were held by knight service "it could not by any usage be parted between males," Y.B. 6 Ed. II. (S.S.) 201.

[8] Glanvil vii 3; we find the rule in the Assize of Jerusalem, 1099; in the rule that Frederick Barbarossa made for dukes, counts, and marquises, 1158; and in

services; and, in the days when the military tenures really supplied soldiers, it made for the efficiency of the service itself. How could a tract of land split up among a dozen small proprietors provide an expensive knight? It was on much the same principle that we find on many manors a custom that the villein tenements shall descend to one person—either the widow or the eldest or youngest son. Perhaps at first the person upon whom the land thus descended as one undivided whole was not regarded as its owner. His younger brothers lived on the land with him. They held it together "in parage" as equals (*pares*); but it is the eldest to whom the lord looks for the due performance of the services; and when once a man is thus held responsible he is on the high road to ownership. He grasps at this position and attains it at the expense of his brothers. Their claims escape the notice of the law and become merely moral.[1]

It was in the case of lands which were held upon terms which did not admit of the application of this seignorial pressure that the old rules which divided the land among the sons survived the longest. Both Granvil and Bracton knew land held by socage tenure which was partible among heirs and had always been so partible.[2] No doubt it had always been so divided in the days before the Conquest. But, as the rules affecting the military tenures were applied by the royal courts to all free tenures, primogeniture became the rule. It came to be thought that, except in Kent, partibility must be proved as a special custom.[3] The rule was so stated by Herle in argument as early as 1309.[4]

At the very time when primogeniture was becoming the general rule for all lands held by free tenure the original reason for the establishment of the rule was fast sinking into oblivion. We have seen that in the thirteenth century the military service of the military tenant was becoming obsolete;[5] the rule of primogeniture could no longer be explained by the military needs of the feudal host. For the old explanation a new but similar one was substituted, based upon national needs. In Edward I.'s reign it is said to be needed in order to maintain a race of wealthy

Brittany in 1185, see Kenny, Primogeniture 10, 11; for the influence of this idea in Germany see Schulte, Histoire du droit de l'Allemagne (Tr. Fournier) 233-235; cp. Bl. Comm. ii 215.

[1] P. and M. ii 261, 262.

[2] Glanvil vii 3; Bracton f. 76; P. and M. ii 268.

[3] Plac. Abbrev. 28b (1200)—the burden of proof seems to be on the person asserting partibility, but this is not very conclusive, as he is the plaintiff; Y.B. 20, 21 Ed. I. (R.S.) 326 it is argued that impartibility is the rule except in Kent; but Y.B. 33-35 Ed. I. (R.S.) 514 it is ruled that custom may make even a knight's fee partible—a rule denied by Bereford, C.J., above 172 n. 7; for Kent see below 261.

[4] Y.B. 2, 3 Ed. II. (S.S.) 97, "It is against common law that tenements should be partible among males. So it behoves you to say how they are partible, and how and between whom partitioned."

[5] Above 45.

landowners who can see to it that the land is cultivated and the cultivators protected.[1]

Of the rule of coparcenary I have already said something.[2] Like the rule of primogeniture, it rests upon the interest of the lord; and at one period it was perhaps possible that the lord would get the right to choose which of the daughters should inherit.[3] But this idea is based upon the notion that that which is inherited is something more than mere land—that it is office and franchise. The idea disappeared when land came to be regarded merely as a form of property. It survives only in the rule that if a peer dies leaving only daughters the peerage is in abeyance, and that the crown may determine the abeyance in favour of one of the daughters.[4] The rule that the daughters take together as coparceners is as old as Glanvil;[5] but both in his day and in that of Bracton the eldest held of the lord and was answerable for the services.[6] The younger daughters held of the eldest and did their service through her. It might have been that if this scheme had prevailed the rights of the younger sisters would have become merely moral.[7] But it did not prevail, because, when the incidents of tenure came to be more valuable to the lord than the services, another scheme was found to be more profitable to him. From the beginning of the thirteenth century the king had been in the habit of making all the parceners do homage to him, and of thus securing for himself the incidents of tenure.[8] The ordinance of 1236, which declares this to be the law in the case of tenants in chief, also states that if the parceners hold of a mesne lord, only the eldest does homage, but that the lord is entitled to wardships and marriages from all.[9] But, under this arrangement, mesne lords often found it difficult to get their wardships and marriages.[10] Britton recommends them to imitate the king and to

[1] In 1276, in the charter by which Edward I. disgavelled the lands of John of Cobham, it is explained that, "It has often happened by the ancient Kentish custom of partition in gavelkind that lands and tenements, which in certain hands when undivided are quite sufficient for the service of the state, and the maintenance of many, are afterwards divided and broken up amongst coheirs into so many parts and particles, that no one portion suffices even for its owner's maintenance," Robinson, Gavelkind 60.

[2] Vol. ii 349.

[3] P. and M. ii 273 citing Bracton's Note Book case 12—but, as Maitland points out, the plea which attempted to assert this principle was probably overruled; cp. case 1273, which decided that the lands of the Earl of Chester were divisible among coparceners.

[4] Co. Litt. 165a.

[5] vii 3.

[6] Ibid; Bracton f. 78; P. and M. ii 274, 275.

[7] P. and M. ii 276.

[8] The law is so stated in the writ sent by the king to Ireland in 1236; the writ is sometimes called *Statutum Hibernice de Coheredibus*, P. and M. ii 275.

[9] To allow the eldest sister the guardianship "esset quasi committere agnum lupo de orandum," seeing that she has all to gain by their death without issue.

[10] Vol. ii 349.

take the homage of all the parceners.[1] This meant that the interest of all the daughters was definitely recognized by law; so that, just as the interest of the lord in the service of his military tenants had in former days made for primogeniture among sons, so, in later days, his interest in the incidents of tenure made for coparcenary among the daughters.

(3) The rule of representation.

The descendants of a child stand in the place which the child himself would have occupied had he been alive. Thus the children (male or female) of an elder son inherit before a younger son. The law had not adopted this rule in Glanvil's day.[2] But it was coming to be the law in the time of Bracton. Bracton regards it as the true rule. Indeed, it is involved in the principles underlying the law of inheritance.[3] But its application to the case of uncle and nephew was hindered by the *casus regis*.[4] To have ruled that the nephew, the son of an elder son, had a better title than his uncle, the younger son, would have been an aspersion upon John's title to the throne, and therefore upon the title of his son Henry III., the reigning king. Though in Edward I.'s Year Books we perhaps see some traces of this old hesitation as between uncle and nephew, the principle seems to be admitted;[5] and it is clear that the remoter descendants from a son are preferred to the nearer descendants from daughters.[6] As Maitland points out, the principle of representation was accepted and acted upon in the great case between Bruce and Balliol for the crown of Scotland. "Bruce, though he stood one step nearer to the common ancestor, was sadly at a loss for arguments which should win him precedence over Balliol, the representative of an older line."[7]

(4) The exclusion of ascendants.

No lineal ascendant of the person from whom descent is traced can inherit the land; but the brothers and sisters and other descendants of such ascendant can inherit. The rule is clear enough as early as Glanvil's day; but neither he nor Bracton attempt to explain it. They can only say that an inheritance, like a heavy body, cannot fall upwards.[8] Two explanations of the

[1] ii 29.
[2] vii 3; P. and M. ii 282.
[3] Below 178.
[4] P. and M. ii 283.
[5] Y.B. 33-35 Ed. I. (R.S.) 154, "Note by *Warr*. If the uncle enter as heir apparent while the true heir is out of the kingdom, and die seised, and his son be seised, although the true heir comes back he shall never recover by English law"—this looks as if the heir could recover from the uncle.
[6] Y.B. 33-35 Ed. I. (R.S.) 236; Y.B. 14, 15 Ed. III. (R.S.) 34—it is assumed that each parcener's share descends to her issue; ibid 200, 202.
[7] P. and M. ii 284.
[8] Glanvil vii 1, "Nunquam naturaliter ascendit;" Bracton f. 62b, "Descendit itaque jus quasi ponderosum quid cadens deorsum recta linea vel transversali, et

rule have been offered. The first is that of Blackstone.[1] He tells us that the rule is of "feudal original." If a *feudum novum* were granted to a son, it was only the descendants from his body who were entitled to succeed. If, on the other hand, he had succeeded to a *feudum antiquum* by inheritance from his father, his father must be dead. In order to enlarge the possible number of heirs to the son he might be granted a *feudum novum* to be held *ut feudum antiquum*. This had all the qualities of a true *feudum antiquum*. Therefore the direct ascendants could not take, as they had in theory died. The second theory is that of Maitland.[2] He suggests that it springs from the rule laid down by Glanvil that a man cannot be both lord and heir. If A enfeoffed his son B of land, and B had done homage to A, A was entitled to the services due from the land—he held it in service; and B was entitled to the land—he held it in demesne. It was thought that A, having the services, could not inherit the land. A, therefore, would be passed over and the land would go to the next heir. It was only if all the heirs failed that A could take the land as an escheat.

Blackstone's theory may be true of a Lombard rule which was known in the Middle Ages;[3] but there is no proof that any such theory was ever received in this country. It is open to the objection that it proves too much. According to it an elder ought not to be able to succeed to a younger brother; but there is no doubt that he was able to do so. At first sight it would seem as if the rival theory was open to a similar objection. According to the rule that no man may be both lord and heir, not only the father but also the elder brother might be excluded. For instance, A enfeoffs his younger son C, reserving homage, and dies; C dies without issue; his elder brother B cannot inherit from C because the lordship of C's lands has descended to him on the death of A.[4] Moreover, if the rule excluding ascendants rests upon this ground, the statute Quia Emptores[5] ought to have abolished it. Bracton is quite clear that if the land is not held of the father,[6] or if the father has taken no homage of his son,[7] the rule does not apply. In such cases the father is not lord and therefore can be heir. But this was the state of things invariably effected in every case of a conveyance in fee simple as the result of the statute. These are difficulties

nunquam reascendit ea via qua descendit, post mortem antecessorum. A latere tamen ascendit alicui propter defectum hæredum inferius provenientium;" there is a good deal of very unprofitable speculation on this topic in Ratcliff's Case (1592) 3 Co. Rep. at ff. 40a, 40b.

[1] Comm. ii 211, 212.
[2] P. and M. ii 286-293.
[3] Hale, Common Law 248; P. and M. ii 286.
[4] Bracton ff. 65b, 277.
[5] 18 Edward I. c. 1.
[6] f. 65b.
[7] f. 277.

in the way of this explanation. They are perhaps diminished by the following considerations. Britton, who wrote just after *Quia Emptores*, says positively that the father can inherit from the son.[1] He probably thought, rightly enough, that this was the logical result of the fact that the father who made a gift to the son in fee simple was no longer the son's lord. But, though there is no doubt that the effect of the statute was to render obsolete the rule that no man can be both lord and heir,[2] though, consequently, the elder was admitted to succeed to the younger brother, the father was not admitted to succeed to the son. That this was so was due largely to the fact that the rule excluding direct ascendants had hardened into a positive rule of law. Partly perhaps it was due to the fact that other reasons had been found for it. Perhaps the original reason for the rule that a man cannot be lord and heir was a feeling that it was dangerous to give a lord an interest in his tenant's death. It might be dangerous to the tenant (especially if that tenant was a minor) to allow the lord to get his land by becoming his heir.[3] The statute of Quia Emptores did away with this danger by making it very unlikely that a lord could ever be in a position to claim as heir. But, as Holmes has very truly said,[4] "When ancient rules maintain themselves . . . new reasons more fitted to the time have been found for them, and they gradually receive a new content, and at last a new form, from the grounds to which they have been transplanted." We may have here an instance of the application of this principle. In most cases there would be no risk in allowing the elder to succeed to the younger brother; but it may have been thought dangerous to make parents their children's heirs. The antagonism of interest, which may have been at the root of the notion that a man cannot be both lord and heir, may, with the decay of feudal relations, have taken this new shape.

(5) The inheritance of collaterals.

The rights of collaterals may be regulated by either a "gradual" or a "parentelic" scheme.[5] The law of intestate

[1] Britton ii 319, 325; cp. note to MS. *N* ii 164.

[2] See P. and M. ii 291, n. 6.

[3] Cp. the statute de coheredibus above 174 n. 9 for this feeling in the case of sisters, who are on this ground deprived of guardianship in favour of the lord. Perhaps also we may see the idea that as a matter of public policy tenures are to be maintained, not extinguished, cp. Bracton f. 24, "Homagium non evanescit nec extinguitur cum sint alii heredes cognati vel fratres;" but in later times, when the maintenance of tenures ceased to be a matter of public policy, the former reason would come to the front, and lead to the new form of the rule excluding the direct ascendant.

[4] Common Law 36.

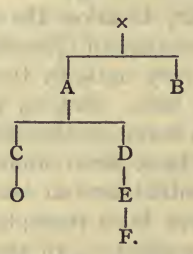
[5] P. and M. ii 293 seqq. See Bl. Comm. ii 207, 208 n. 4 as to the differences in the methods of computation employed by the civil and canon law in working out the gradual scheme.

succession to personality is regulated almost entirely by the first scheme, the law of inheritance to realty by the second. It will help us to understand this part of the law of inheritance if at the outset I say something of these two schemes.

According to the gradual scheme each step in the descending or the ascending line is a degree. You take a given *prepositus*, and you reckon as a degree each step from him to the person whose relationship to him you are seeking to determine. Thus a son is one degree from his father, two degrees from his brother, three degrees from his brother's son.

According to the parentelic scheme you take a given *prepositus* and exhaust all his descendants—his *parentela*. When you have exhausted them you take another *prepositus* and repeat the process.

The following table will illustrate the difference between the two methods of computation :—



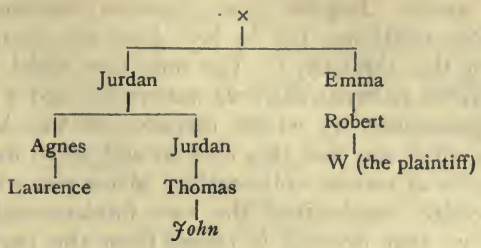
Let O be the *prepositus*. O to F = five degrees, reckoning up to A and down to F. O to B = four degrees. Thus if you reckon according to the gradual scheme B is nearer to O than F. Now let us see what happens if you reckon according to the parentelic scheme. Seeing that O has no descendants, you look first at C to see if he has any descendants. He has none. You then go to A and take his descendants in order. If D and E be dead, F will take after O, for, as we have seen, neither A nor C can take because they are direct ascendants. Thus F, though farther from O than B, if we reckon by the gradual scheme, is nearer if we reckon by the parentelic.[1]

Both the Year Books and the text writers show us that it is the parentelic scheme which is the basis of the law of inheritance. Let us take an instance from one of the earliest Year Books of Edward I.'s reign. In a case reported in 1293[2]

[1] The case of Clere v. Brook (below 182) illustrates the difference. Edward Clere was nearer by proximity of blood. To this argument the defendant answered that they were not in one degree, so that proximity of blood could not be regarded, Plowden 448.

[2] Y.B. 21, 22 Ed. I. (R.S.) 36, 38.

the following pedigree can be constructed from the pleadings of the parties:—



The plaintiff traced his claim from John, and contended that as neither Thomas, nor Jurdan the grandfather, nor Jurdan the great-grandfather had left issue, the land must descend to the issue—the parentela—of X, of which he, W, was the representative. He was met by the assertion that "Jurdan the great-grandfather had a son named Jurdan and (the son had) a sister named Agnes, which Agnes had a son named Laurence, who is still alive; and if there is to be a resort, it should be to Agnes, the sister of Jurdan the grandfather and to Laurence, the son of Agnes, rather than to Emma, the sister of the great-grandfather." The other side could not answer this reasoning except by the averment that Agnes was illegitimate. Britton[1] thus states the principle: "For default of heirs who would have made a degree in the direct line, the right shall descend to one who shall be found in the collateral line, and for default of a degree in the collateral line, the right shall resort again to the direct line at a higher degree, and if it find that degree full it shall attach there; if not, it shall go on descending in the collateral line, and so of all the other degrees."

But when all a given couple's descendants are exhausted, and it is necessary to have recourse to the ascending line, the question arises, Are we to ascend in the maternal or in the paternal line? Early law answered this question by the application of the maxim "*paterna paternis, materna maternis.*" If the land has descended from the father we ascend in his line; if from the mother we ascend in her line.[2] But, having decided whether the estate is to go to collaterals *ex parte paterna* or *ex parte materna*, another difficulty awaits us. How are we to decide between the descendants from the different ancestors of the father and the mother? Granted that the estate goes to collaterals on the father's side, how are we to decide between the collaterals which descend from that father's

[1] ii 325.

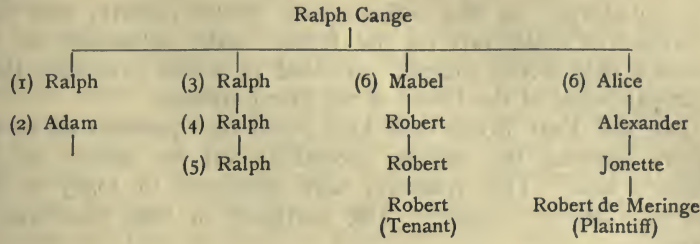
[2] Bracton f. 64; P. and M. ii 297, 298; for illustrations of the rule cp. Y.BB. 33-35 Ed. I. (R.S.) 302; 2, 3 Ed. II. (S.S.) 81.

two parents? Glanvil does not meet the difficulty at all.[1] He does not seem to contemplate any more remote relations than uncles or aunts. Bracton does, however, consider the case of more remote relations; but he lays down no certain rules for the solution of this difficulty.[2] The only clue which we have is the maxim *paterna paternis, materna maternis;* and if we look at the ordinary procedure by which disputes of this kind were then settled, we shall see that this maxim will solve many difficulties as to the title of remote collaterals. Moreover, we shall see that this procedure emphasized the two fundamental rules of the common law that descent is traced from the person last seised, and that the claimant must be of the blood of the first purchaser —i.e. he must be either descended from him or from some ancestor of his.

As between remote relations the possessory assize of mort d'ancestor did not lie.[3] Recourse must be had to a writ of right; and Bracton tells us that you cannot generally get beyond the sixth ancestor because you cannot go behind the time limited for bringing a writ of right—a rule which of course became obsolete by the omission to pass new statutes of limitation.[4] What, then, was the procedure on a writ of right brought by a remote relation to recover his inheritance? It was neither the duel nor the grand assize; but it was "per narrationem"—i.e. the claimant must strictly deduce his descent from some remote ancestor who had an undisputed right.[5] The defendant must rebut the prima facie case so raised by attacking the pedigree and showing that he is the nearer heir. Thus the procedure adopted made it necessary for a remote relation to derive his claim, if he could, from the original purchaser, or from some one as near thereto as the existing statutes of limitation allowed him to go.[6] The court decided whether on the facts proved the plaintiff or the defendant had the better claim. It did not attempt to lay down abstract rules for determining between conflicting lines of ascendants. As in any other case of disputed ownership, it simply decided the question of *majus jus.*[7] Let us take an illustration of the manner in which these rules worked from an actual case. In a case argued in 1304[8]

[1] vii 4.
[2] ff. 67, 68; cp. Fleta 6. 2; Y.B. 39 Ed. III. p. 30 *per* Finch, J.
[3] Above 23. [4] Bracton f. 67; Britton ii 324.
[5] Bracton ff. 267, 267b, 268, 279; Y.B. 5 Ed. II. (S.S.) (1312) 165-166 *per* Scrope, J.
[6] Ibid f. 372, "Non enim sufficit simpliciter proponere intentionem suam sic dicendo, Peto tantam terram ut jus meum, nisi sic illam fundaverit quod doceat ad ipsum jus pertinere, et per quam viam et per quos gradus, jus ad ipsum debeat descendere."
[7] Above 7, 89-90. [8] Y.B. 32, 33 Ed. I. (R.S.) 16-20.

the following pedigree was set out in the pleadings of the plaintiff:—



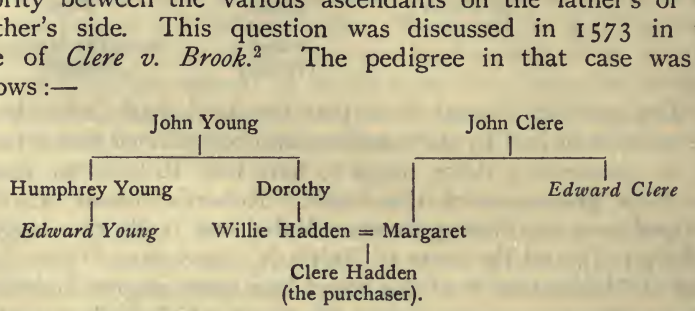
The plaintiff showed how that the land had descended in the order indicated by the numbers, and complained that whereas he, as representing Alice, ought to have half, Robert, the tenant, had kept possession of the whole. Robert's answer was that this pedigree was wrong, because Mabel was really the daughter of Ralph (4), and the sister of Ralph (5); and thus, "since he is issue of Mabel, who is of the blood in a lower degree, judgment, if he ought to be answered on his resort which he has made to one of the blood higher up." Issue was joined on this averment.

That the law thus managed to get on well enough without any very determinate rules as to the rights of remote collaterals was no doubt due to the fact that cases in which the rights of such collaterals come into question are not of common occurrence. But in Edward III.'s reign a case arose to which the existing rules gave no clear answer. It was for this reason an important case, and its importance is shown by the fact that the Year Books give us two reports of it.[1] A man purchased land and died seised thereof without descendants, and without heirs on the part of his father. The bailiffs of the town of C. claimed this land as an escheat. The plaintiff claimed to inherit as heir on the part of the purchaser's mother, and judgment was given for him. Tank, J., said, "When the land once comes into the blood of the father by the descent of the inheritance, there is no doubt that it will not resort back to the blood of the mother; and the same is true of the converse case. It will rather escheat to the lord, because, as the land comes down from the person who had it, it is reason that it be continued in that person's blood. But when the land comes to a man by his own purchase, and has not descended to him, but he is the beginning of this inheritance; in that case when his father's branch fails it is reasonable that it descend to the heirs on the part of the mother rather than that it should escheat to the lord."

[1] Y.B. 49 Ed. III. Pasch. pl. 5; 49 Ass. pl. 4, the decision was in accordance with the law as laid down by *Finch*, J., in 39 Ed. III, Mich. p. 30.

This decision was followed in Edward IV.'s reign.[1] We may gather, therefore, from these cases that, on failure of descendants, collaterals on the father's side would inherit; and that, on failure of collaterals on the father's side, collaterals on the mother's side would inherit, provided in either case that these collaterals were of the blood of the first purchaser.

But the Year Books still kept open the question as to the priority between the various ascendants on the father's or the mother's side. This question was discussed in 1573 in the case of *Clere v. Brook*.[2] The pedigree in that case was as follows:—



The question to be decided was whether Edward Young or Edward Clere was the heir to Clere Hadden the purchaser. It was held that Edward Young was the heir, because the ascendants in the paternal line and their descendants must be exhausted before recourse can be had to the mother and the maternal ascendants. So far the decision followed the Year Book cases, and added nothing to the law. But Manwood, C.B., ventured on the dictum, assented to by the judges of the court of Common Pleas,[3] that if there is only a question as between paternal ancestors, the descendants of the less remote female paternal ancestor will be preferred to the descendants of the more remote female paternal ancestor. For instance, the brother or sister of the purchaser's grandmother will be preferred to the brother or sister of the purchaser's great-grandmother. This dictum seems at the time to have been accepted as good law. Thus Bacon says,[4] "In the first degree the law respecteth dignity of sex and not proximity; and therefore the remote heir on the part of the father shall have it before the near heir on the part of the mother; *but in any degree paramount the first, the law respecteth it not;* and therefore the near heir of the grandmother on the part of the father shall have it before the remote heir of the grandfather on the part of the father;" and the law is so stated by Hale.[5]

[1] Y.B. 12 Ed. IV. Mich. pl. 12.
[2] Plowden 442.
[3] Ibid at p. 451.
[4] Works (ed. Spedding) vii 328.
[5] Common Law 271, 272, "The father's mother's sister shall be preferred before the father's grandmother's brother . . . because they are all in the female line and the father's mother's sister is the nearest."

But, after all, this opinion really rested on a dictum, and, as Plowden and others saw, it was not a very logical dictum. He tells us that he afterwards put it to the judges of the court of Common Pleas that, from the actual decision in the case, the correct deduction was that the descendants of the more remote female paternal ancestor should be preferred to the descendants of the less remote female paternal ancestor. For, if the brother of the purchaser's grandmother is preferred to the brother of the purchaser's great-grandmother why should not the brother of the purchaser's mother be preferred to the brother of the purchaser's grandmother?—and in that case Edward Clere would have succeeded.[1] But the judges adhered to their opinion. They had followed the older cases in giving the preference to the paternal ascendants. They were not inclined to carry this preference of male to female any further than they were obliged, even to satisfy the claims of logic.[2] But the claims of logic found a champion in Blackstone.[3] He had no difficulty in showing that the logical consequence of the decision in *Clere v. Brook*, and of the other rules of inheritance, was to give the preference to the descendants of the more remote female paternal ancestor rather than to the descendants of the less remote. Largely in consequence of his advocacy the logical view has received the sanction of the legislature.[4]

(6) The position of the half blood.

In the thirteenth and early fourteenth centuries the position of the half blood in the scheme of inheritance was very uncertain. In the first place, the position of the half blood is not immediately obvious,[5] and that is a position which easily leads to the formation of an arbitrary and even an accidental rule. In the second place, the question was obscured by the fact that the mode in which brothers and sisters succeeded to one another differed from the mode in which other relations

[1] Plowden 451, "Many were of opinion that, because there was no nearer heir of the male line, the brother of the grandmother should not be preferred (as Justice Manwood had said) but that the brother of the great-grandmother should be adjudged heir, for his blood is derived from the purchaser by two males, viz. by his father and grandfather, whereas the blood of the brother of the grandmother is derived from the purchaser but by one male, and the grandfather was not of the blood of the brother of the grandmother, but he was of the blood of the brother of the great-grandmother, and therefore such blood is more worthy."

[2] Just as the rule of representation was not at once accepted in the case of near relations (above 175); so the preference of males to females was not at first applied to the case of remote relations.

[3] Comm. ii 238, 239 and Christian's note.

[4] 3, 4 William IV. c. 106 § 8.

[5] P. and M. ii 303, "We cannot say nowadays that there is any obviously proper place for the half blood in a scheme of inheritance, especially in our parentelic scheme."

succeeded to one another. Brothers and sisters, according to Bracton, had an equal right to the possession; and the assize of mort d'ancestor did not lie between them.[1] So intimate was the union between parceners that they did not inherit from each other, but took like joint tenants in modern times, "by a kind of right called that of accruer."[2] Those related by the half blood, however, had no such equal right, and were regarded as taking by inheritance from those of the whole blood.[3] But neither Bracton, Britton, nor Fleta knew any certain rules as to the order in which they ought to succeed. The only principle which they apply seems to be the old principle *paterna paternis, materna maternis.* Thus, the sister of the whole blood will succeed to the brother, if the brother is the purchaser; but if the common father is the purchaser, brother and sister succeed to the paternal inheritance as if they had both sprung from the same mother.[4] On the other hand, if the inheritance is the mother's, a daughter of hers will be preferred to a son by a second wife.[5] But the son may succeed to the daughter after the death without issue of all the children of the first wife.[6]

The growth of the two rules that the heir must be (1) the heir of the person last seised, and (2) of the blood of the first purchaser, cleared this confusion and settled the position of the half blood.

When it was settled that descent must be traced from the person last seised it became clear that, if the common father was the person last seised, a half-brother could succeed to him on the death of the half-brother. There can, of course, be no question of the half blood as between ancestor and descendant.[7] It was for this reason that half blood could always succeed to half blood in the case of an estate tail, because in the case of these estates descent was always traced from the purchasing ancestor.[8] But if the person last seised was the son, his brother by the half blood could not succeed to him, because he was a collateral and not necessarily of the blood of the first purchaser. Thus the sister of the whole blood succeeded to the brother of the whole blood —*possessio fratris facit sororem esse heredem.* Half blood could not succeed to half blood; the land would sooner escheat, because

[1] ff. 64b, 65, 267.

[2] Britton ii 73, 316.

[3] Bracton f. 65b, "Poterint hæredes esse pares, cum fuerint de uno patre vel de una matre a quibus jus descendit. Si autem de diversis tunc impares."

[4] Bracton f. 66b; Fleta 6. 1. 13.

[5] Bracton f. 65; Fleta 6. 1. 14; Britton ii 317, 318.

[6] Ibid 316, 317; Bracton f. 66b.

[7] Bracton distinguishes the case where the land was an acquisition from the common father from the case where it was an acquisition of the brother, f. 66b.

[8] Y.BB. 4 Ed. II. (S.S.) 58-59; 5 Ed. II. 147; 6, 7 Ed. II. (S.S.) 73-74; 12 Ed. II. 380.

they were collateral kinsmen, and not necessarily of the blood of the first purchaser. We have seen that as late as Edward III.'s reign it had been contended that there ought to be an escheat when the first purchaser died seised leaving only maternal kin ;[1] it is not altogether surprising that this contention was sanctioned when the kin were not clearly of the blood of the first purchaser. The rule had been practically reached in Edward I.'s reign,[2] certainly by Edward II.'s reign.[3] It is stated in its modern form by Littleton.[4]

The rule, then, was a deduction from the two premises that the heir must make himself heir to the person last seised, and that he must be clearly of the blood of the first purchaser. As Blackstone pointed out, it was not an altogether logical deduction.[5] Granted that a relation of the half blood is not clearly of the blood of the first purchaser, there is at least a chance that he may be; and a chance as great as that of a relation of the whole blood in a remote degree, e.g. the half-brother has the same chance of being descended from the purchasing ancestor as the uncle. Moreover, the rule was especially unreasonable when the ancestor of both brothers was known, and when, therefore, they were both equally likely to be of the blood of the first purchaser.

The rule made for escheats.[6] It made clear law where before all was vague. But it was barely logical, and it was productive of such great hardship that even Blackstone recommended its alteration.[7]

§ 9. Curtesy and Dower

Curtesy

The husband after the death of the wife may be entitled to an estate by the curtesy. If no child has been born of the marriage the wife's real estate descends to her heirs. The husband has no claim to it. If a child has been born of the

[1] Above 181.

[2] Y.B. 21, 22 Ed. I. (R.S.) 552—*Hyham*, *arg.*, says, "We freely admit that Alice died seised; but from Alice to Laurence as brother nothing could descend, because they were not of the same venter; there would sooner be an escheat;" but the rule was not quite fixed, cp. Y.B. 32, 33 Ed. I. (R.S.) 444.

[3] Y.BB. 3, 4 Ed. II. (S.S.) 25; 5 Ed. II. 148; 6 Ed. II. (S.S.) 198; 6, 7 Ed. II. (S.S.) 70 *per* Bereford, C.J.; 12 Ed. II. 380; 19 Ed. II. 628—in these cases the rule is accepted; the dispute is as to the person from whom the descent is to be traced; in the last case Scrope makes the question whether the brother of the half blood can inherit depend entirely on the question whether the sister has died seised. The rule is clearly explained by *Finch*, J., in Y.B. 39 Ed. III. p. 30; cp. 14 Ed. III. (R.S.) 120 *per* Schardelowe.

[4] § 8.

[5] Comm. ii 230, 231.

[6] P, and M. ii 303.

[7] Comm, ii 233.

marriage who was capable of inheriting the wife's lands, the husband is entitled to an estate in the whole of the wife's lands for his life. This estate is called tenancy by the curtesy, or tenancy by the law of England. Blackstone derives the word "curtesy" from "curialitas;" he says that it means an attendance upon the lord's court or *curtis*. "As soon as any child was born the father began to have a permanent interest in the lands, he became one of the *pares curtis*, did homage to the lord, and was called tenant by the curtesy initiate."[1] As Maitland has shown, this derivation is rather ingenious than true.[2] (1) To say that it is connected with homage and attendance on the lord's court contradicts Littleton.[3] Littleton says that homage need not be done for a life estate; and therefore, if the husband delay homage till the wife's death, he need not do homage at all. (2) The name "tenancy by the law of England" would seem to emphasize its peculiarity to England.[4] Britton calls it "une especialité graunté par ley en Engleterre et en Hyrelaunde."[5] The name "curtesy" would seem to emphasize the liberality of the right; and the liberality of the right is the point which would strike a lawyer who was comparing it with the analogous custom of Normandy.[6] In Normandy, if a child was born, the husband took the wife's estate, but he lost it if he married again. From another point of view, too, it is a liberal right. It gives the husband the land and defeats the lord's right of wardship.[7]

What, then, was the origin of this right? Old customs regulate in many different ways the rights of the husband in his wife's land after his wife's death.[8] Thus by the gavelkind custom of Kent and by some copyhold customs the survivor, whether husband or wife, is entitled to half the other's lands.[9] This right is often called free bench—though in some manors the name "free bench" is appropriated to widow's right. But this right ceases if the husband marries again. Perhaps in old days the husband may have got his right as guardian of his children. But a later age separates the right of the husband as guardian from his personal right to his deceased wife's land.[10] Thus in Kent he may take one half during minority as guardian, and the other half while he remains unmarried as widower.

It is probable that the rules laid down by the king's courts

[1] Bl. Comm. ii 126, 127. [2] P. and M. ii 412. [3] § 90.
[4] Bl. Comm. ii 126 n. 4; P. and M. ii 413. [5] i 220.
[6] P. and M. ii 413. In many places the husband was given no rights at all, Brissaud ii 1658.
[7] P. and M. ii 415.
[8] For the various older continental customs see Brissaud ii 1649-1653.
[9] Robinson, Gavelkind 128, 129; cp. Borough Customs (S.S.) ii cvii-cxi for the customs observed in the boroughs.
[10] P. and M. ii 416, 417.

were based upon some such indeterminate rules as these. The idea that the widower takes as guardian may be represented by the rule that required the birth of issue.[1] But the modern rule, as developed by the common law, diverged widely from the primitive customary rules in the interests of simplicity. The same set of ideas which made for the impartibility of inheritances[2] made for the rule which gave the whole estate to the husband for his life; and the desire to secure simplicity and uniformity made for the extension of the husband's right to the case when the child had died. In many cases it would be far easier to prove the fact of birth to a jury of the neighbourhood than the fact of death. The idea of guardianship is only one of the ideas underlying the husband's right. If in conformity with that idea we deprive him of his rights in the event of no child being born, we compensate him by giving him the estate for his whole life if a child has been born; and we cannot stop to inquire whether or no that child has died. The common law in laying down its general rules has made other rough compromises of a similar kind.[3] Thus the common law extended the husband's right; and so courteously and liberally was it inclined to push this policy that a statute was needed to define its limits. It had been held, after some conflict of opinion,[4] that a second husband could hold for his life even his wife's marriage portion (i.e. lands given to her and the heirs of her body by her first husband) as against the issue of her first husband. The Statute *De Donis*[5] enacted that for the future[6] the second husband should have no right to curtesy in respect of such lands.

The four conditions precedent for the existence of an estate by the curtesy are marriage, seisin of the wife, issue, and death of the wife.[7] I have already said something of the first requisite. The temporal courts often required that there should be some open and notorious act—"some act in pays"—from which the jury could infer the existence of the marriage. The mere consent of the parties, which was sufficient for the canon law, was not always enough for the king's court.[8] The other two requisites about which a word must be said are the requisites (1) of the wife's seisin, and (2) of the child's birth. (1) The wife must be seised of such an estate of inheritance as the issue which the

[1] Bl. Comm. ii 126; P. and M. ii 417.

[2] Above 172-173.

[3] See e.g. above 80 as to freedom of alienation; above 75 as to freedom of testation; vol. i 628, 629 as to the limits of lay and ecclesiastical jurisdiction.

[4] Bracton f. 437b; P. and M. ii 414 and authorities there cited.

[5] 13 Edward I. st. 1 c. 1.

[6] The statute was not retrospective, Y.BB. 21, 22 Ed. I. (R.S.) 276; 30, 31 Ed. I. (R.S.) 126.

[7] Bl. Comm. ii 127.

[8] Vol. i 622.

husband has by her may by possibility inherit;[1] and the estate must be in possession. There can be no curtesy of a reversion or a remainder unless it vests in possession during the marriage. A mere seisin in law will not suffice. No doubt the reason for the rule requiring an actual seisin is based partly on the general principle that a husband, like any one else not actually seised, has nothing; and having nothing of his wife's, nothing can survive to him.[2] Partly it is based on motives of policy. It was a rule which induced husbands to make every effort to get seisin in an age when the getting of seisin was often difficult and dangerous.[3] The latter reason appears to have predominated in Coke's day.[4] If it was quite impossible to get seisin this requisite ceased to be essential. If, for instance, the wife had an advowson or the right to receive a rent, and the wife died before the church fell vacant or the rent fell due, the husband was excused.[5] (2) The issue must have been born alive.[6] The older authorities say that it must have been born and heard to cry within the four walls, because this was in early days regarded as almost necessary evidence of the vitality required.[7] It must also be such an heir as the common law will recognize. That is, it must be born of a marriage recognized by the royal courts and during the subsistence of such marriage. Subsequent marriage will not make a child born before the marriage legitimate for the purpose of succeeding to English land.[8]

The later history of curtesy may be briefly dismissed. It was originally doubtful whether the husband could claim curtesy if the estate of the wife was equitable. The *Doctor and Student*[9] states that one reason for the prevalence of uses was "to put away tenancy by the curtesy." But it is now settled law that the husband is entitled to curtesy out of his wife's equitable estates under the same conditions as he is entitled to curtesy out of her legal estates.[10] This gives the husband the right to curtesy out of the

[1] Litt. § 52. [2] Above 92.

[3] Williams, Real Property (17th ed.) App. D.

[4] Co. Litt. 31a, "It lieth not in the power of the wife to bring it to an actual seisin as the husband may do of his wife's lands when he is to be tenant of the curtesy;" for another, baseless reason, founded on the necessity for the seisin of the wife if her child was to be heir to her, see Co. Litt. 40a; Bl. Comm. ii 128; Williams, Real Property App. D.

[5] Co. Litt. 29a; a curious modern instance of the application of this principle will be found in the case of Eager v. Furnival (1881) 17 C.D. 115; The Doctor and Student ii c. 15 seems to regard the rule as merely arbitrary.

[6] Litt. § 35.

[7] Ibid; Bracton f. 438; Y.B. 20, 21 Ed. I. (R.S.) 38, "Note that in order that the husband may hold the inheritance of his wife by the Curtesy of England by reason of issue between them, it is necessary that the issue be heard to cry or squall within the four walls."

[8] Vol. i 622; vol. ii 218 n. 1. [9] ii 22.

[10] Casborne v. Scarfe (1737) 1 Atk. 603.

separate estate of his wife, whether such separate estate is settled by express limitation[1] or arises under the Married Women's Property Acts,[2] provided that the wife has made no disposition of it by her will.

Dower

The wife, after the death of her husband, is entitled to dower.

We have seen that in the Anglo-Saxon period the rights of the wife depended upon the settlement made by the husband or his relatives at the marriage.[3] At the end of this period the wife's right to dower has become a right, given to every married woman by law, to a third of the land for her life of which her husband has ever been solely seised during the marriage for an estate of inheritance to which issue of the wife by the husband might by possibility inherit;[4] and of this right she cannot be deprived by any alienation made by the husband. She can only be deprived of it for certain defined causes and in certain defined ways which are very limited in number. But even at the end of this period, though this common law dower was by far the most usual form, certain survivals still existed which show us that it had only gradually prevailed over other and older modes of providing for the wife's interests.

Littleton[5] tells us that there are five kinds of dower, viz. "dower by the common law, dower by the custom, dower *ad ostium ecclesiæ*, dower *ex assensu patris*, and dower *de la pluis beale*." Neglecting for the moment the last species of dower,[6] we may say that the other four species fall into two classes: (1) those created by the act of the parties, and (2) those created by law. Into the first class fall the dower *ad ostium ecclesiæ* and the dower *ex assensu patris;* into the second class fall dower by the common law and dower by the custom. These two classes represent respectively the old order and the new; and in this order I shall describe them.

(1) The old order—dower created by the act of the parties.

Both Glanvil[7] and Bracton[8] speak of dower as a gift by the husband, which it is his duty to make. It might consist either

[1] Cooper v. Macdonald (1877) 7 C.D. 288, 295.
[2] Hope v. Hope [1892] 2 Ch. 336.
[3] Vol. ii 88-90.
[4] Below 193.
[5] § 51.
[6] Below 192.
[7] vi c. 1, "Dos enim dicitur vulgariter id quod aliquis liber homo dat sponsæ suæ ad ostium ecclesiæ tempore desponsationis suæ. Tenetur quisque tam jure ecclesiastico quam jure seculari sponsam suam dotare tempore desponsationis."
[8] f. 92, "Sciendum quod dos est id quod liber homo dat sponsæ suæ ad ostium ecclesiæ, propter nuptias futuras . . . si vir præmoriatur."

of land or of chattels;[1] but it would not comprise property of the husband acquired after the marriage unless there had been a special stipulation to this effect at the time of the marriage.[2] If the amount were not specified it would be a third of the husband's land. It could not be more in the time of Glanvil;[3] and the rule was the same in the time of Bracton if the lord objected.[4] In the course of the thirteenth and fourteenth centuries these rules were modified. In the first place, the dower of chattels disappeared. We shall see that the married woman could own no chattels—that marriage was regarded as a gift of the wife's chattels to the husband.[5] We shall see that in the fourteenth century the wife's common law right to dower overrode the husband's power to alienate.[6] Therefore to have allowed dower out of chattels would have fettered his powers of free alienation and have cast doubts upon his absolute ownership. It was for these reasons that the dower of chattels was pronounced to be legally impossible in Henry IV's reign.[7] In the second place, the limitations upon the amount of the named dowers disappeared. These limitations were beginning to disappear even when Bracton wrote—the lord, as we have seen, could complain of a larger gift, but a larger gift was not illegal if the heir consented.[8] They had quite disappeared when Littleton wrote.[9] In his day the named dowers had fallen into the two classes above mentioned.

The endowment *ad ostium ecclesiæ* was made by the husband himself. "When a man of full age seised in fee simple, who shall be married to a woman, and when he cometh to the church door to be married, there, after affiance and troth plighted between them, he endoweth the woman of his whole land, or of the half, or other lesser part thereof, and there openly doth declare the quantity and certainty of the land which she shall have for her dower."[10] It takes us back to Anglo-Saxon days—to the settlement made by the husband on the wife which is evidenced by the

[1] Glanvil vi cc. 1, 2; Bracton f. 94; a writ "de dote in denariis" is found in a MS. Register of the early years of Edward I.'s reign, vol. ii App. Vd 12, H.L.R. iii 215; and this writ also appears in the printed Register f. 170b—a proof of the early period at which it became stereotyped, vol. ii 514.

[2] Glanvil vi c. 2; Bracton f. 95b. [3] vi cc. 1, 2.

[4] f. 93. [5] Below 526-527. [6] Below 193-194.

[7] Y.B. 7 Hy. IV. Pasch. pl. 10, "*Markham.*—Ceo ne fuit unques nostre ley que feme serra endowe des biens sa baron; mes auter est per le ley civil, pur ceo que la elle ne serra endowe des terres, mes per nostre ley elle serra endowe de terre, et nemy des biens. *Thirning.*—Per nul maner de droit feme ne poit aver droit d'estre endowe des biens sa baron, et le cause est pur ce que le baron poit aliener touts ses biens, et elle apres son mort n'avera action a demander ascun parcel d'iceux."

[8] f. 93; the lord might complain, but, "secus esset si hæres hoc fecerit sciens et prudens."

[9] §§ 39 and 41.

[10] Litt. § 39; for a case which turned upon this variety of dower see Y.B. 6, 7 Ed. II. (S.S.) 235.

forms which the church employs to consecrate the union.[1] The endowment *ex assensu patris* met the case where the son and heir-apparent (who as yet has nothing in the land) is marrying with the approval of his father. In such a case the son "endoweth his wife at the monastery or church door of parcel of his father's lands or tenements with the assent of his father and assigns the quantity of parcels."[2] It seems to have been much used in the thirteenth and early fourteenth centuries.[3] No doubt its popularity was due to the complete power which the father had acquired to defeat the claims of his heirs by alienation in his lifetime.[4] In both these forms of dower the solemnization of the marriage at the church which accompanied the gift was sufficient evidence of it in the thirteenth and early fourteenth centuries;[5] but later in Edward III.'s reign a deed was required in the case of dower *ex assensu patris*.[6] In such a case there could be no livery of seisin—there was merely an assent of which the country might have no knowledge. It could not therefore be merely averred: it must be proved by specialty. In both cases the wife could enter upon her dower immediately upon the death of her husband. She was not obliged to wait, as in the case of dower at common law, till the heir assigned her her dower.[7]

In later days these two kinds of dower were superseded either by the dower provided by the law, or by the jointures given under the provisions of the more elaborate settlements which it had become possible to make upon a wife at the time of her marriage.[8] In the time of Littleton they were of small importance compared with the dower provided by the law.

(2) The new order—dower created by law.

In the time of Littleton the two forms of dower created by law were, as we have seen, dower at common law and dower by the custom. I shall consider (i) the reasons for the change from the old order to the new, (ii) the contents of the right which the law secures to the widow, and (iii) the modes in which dower may be barred.

[1] Vol. ii 89. [2] Litt. § 40.

[3] See Y.BB. 1, 2 Ed. II. (S.S.) 145, and 3 Ed. II. (S.S.) 68 for two cases dealing with this form of dower.

[4] Above 75.

[5] Glanvil vi c. 11; Y.B. 1, 2 Ed. II. (S.S.) 148.

[6] Y.B. 40 Ed. III. Mich. pl. 26, "*Finchden.*—Assignment de dower per le fitz poit estre averrer sans fait; mes assignment de dower d'assent le pere, ne poit estre averrer, sinon par especialité, et la cause est quant il assigne dower a la feme il meme n'est seisi de frank tenement, par cause le frank tenement est en le pere, et assent ne gist pas en averrment."

[7] Litt. § 43.

[8] For a specimen see below 251-252.

(i) The reasons for the change from the old order to the new.

There can be little doubt that in the twelfth and thirteenth centuries the widow's rights were very uncertain. We have already seen that the tenant's powers over his land were restricted both by the rights of his lord and of his heirs.[1] Till the position of the tenant in relation to these two sets of rights has been determined we must not expect to find much certainty in the position of his widow.

Feudalism, as Maitland points out, made for the curtailment of the widow's rights. "If it is a concession that the dead man's *beneficium* should descend to his heir, it is a larger concession that a third of it should come to the hand of the widow."[2] We may see traces of this feeling in Glanvil's statement that the dower can never be more than a third of the husband's land, and in Bracton's statement that the lord may object if the dower is more than a third.[3] Perhaps the dower *la pluis beale*, as we see it in Littleton, may be a survival from the days when the lord of land held by military tenure looked with no favourable eye upon the widow's claims. If a man, Littleton tells us,[4] dies seised of forty acres, twenty of which are held by knight service and twenty are held by socage, leaving a widow and an infant heir; in that case the lord may hold the twenty acres held by knight service as guardian in chivalry free from all claims to dower, while the widow may satisfy her claims to dower *de la pluis beale*—i.e. of the fairest of the socage tenements, which she holds as guardian in socage. The claims of the lord and the older claims of the family were not settled in the eleventh and twelfth centuries. In the absence of fixed rules of law we get special arrangements made by the parties for themselves—the named dowers,[5] the maritagia,[6] and the conditional gift.[6] In the thirteenth century the feudal claims of the lord were ceasing to curtail the tenant's powers over his land. So far as his lord was concerned the tenant was getting the power to alienate freely. But the question which was not as yet settled was the question how this power of alienation should be reconciled with the claims of the family. Was it to be permitted that a man should sell all his property in his lifetime, and leave his heirs and his widow destitute? With the case of the heir I have already dealt.[7] That the wife's rights needed protection against the action

[1] Above 73-74, 76-77. [2] P. and M. ii 424. [3] Above 190.
[4] § 48; cp. Y.BB. 15 Ed. III. (R.S.) 336; 16 Ed. III. (R.S.) i 52.
[5] Above 190-191.
[6] Above 111-112; cp. Y.B. 20, 21 Ed. I. (R.S.) 142, where in the plea of one of the parties a gift in frank marriage is represented as performing much the same function as dower *ad ostium ecclesiæ*; they are treated together in § 7 of the Charter of 1215.
[7] Above 75.

of her husband may be seen from the provisions of the statutes of Gloucester and Westminster II.,[1] which show that the devices of alienation with warranty and suffering a recovery, in order to defeat the widow's rights, were common. It is evident that if the widow's rights were to be adequately secured they must be defined by a fixed rule of law.

(ii) The contents of the right which the law secures to the widow.

It was probably in the early years of the fifteenth century that the common law dower was fixed at a third[2] of the land of which the husband had ever been solely seised during the marriage for an estate of inheritance to which issue of the wife by the husband might by possibility inherit.[3] As we have seen, the third was already regarded as the reasonable dower in Glanvil's day in the case of land held by military tenure. At one time the mere consent of the wife to the husband's alienation or perhaps even the husband's alienation without such consent, would have barred the wife's rights to dower out of land so alienated.[4] But at the end of the thirteenth century it was settled that the husband's alienation could not affect the right; and that the wife's consent to be valid must be given by means of a fine, during the levying of which she was separately examined by the court as to the reality of her consent.[5] The technical reasoning which made it possible to settle the law in this manner was probably based partly upon a strict interpretation of the clause of the charter of 1217 which deals with dower;[6] and partly upon the analogy

[1] 6 Edward I. c. 3, and the exposition of the statute c. 6; 13 Edward I. st. 1 c. 3 and 4; cp. Y.BB. 21, 22 Ed. I. (R.S.) 460; 8 Ed. II. (S.S.) 99-112.

[2] The value was taken as at the time of assignment, Co. Litt. 32a; Williams v. Thomas [1909] 1 Ch. at pp. 723-724.

[3] Litt. §§ 36, 53. The custom as to dower is so stated in the instructions to the ambassadors to the heiress of the Duke of Bavaria to negotiate a marriage between her and the Duke of Bedford in 1418, Nicolas ii 242, 243; but though the right to dower out of estates in fee simple had been fixed long before this date, the law as to dower out of estates tail had not long been settled; in Edward II.'s reign there was a disposition to hold that a second wife could not claim dower out of a fee tail, on the ground that the provisions of the Statute De Donis as to the second husband's curtesy should be extended to dower, Y.BB. 4 Ed. II. (S.S.) 161-167; 6 Ed. II. (S.S.) 43-44; but it was held in 1411 that such an extension of the words of the statute could not be made, Y.B. 12 Hy. IV. Mich. pl. 3; and the argument in that case seems to have been the foundation of the principle stated by Littleton that the right to dower is dependent on the possibility of inheritable issue.

[4] P. and M. ii 421, 422.

[5] The law is assumed to be already fixed in this sense in the exposition of the Statute of Gloucester, 6 Edward I. c. 6; cp. Bracton f. 95b—he says dower may be barred "per judicium vel per concordiam;" and Y.B. 33-35 Ed. I. (R.S.) 292; in London it could be barred by deed enrolled in the Hustings Court, Calendar of Hustings Wills i xl.

[6] C. 7, "Assignetur autem ei pro dote sua tertia pars totius terræ mariti sui *quæ sua fuit in vita sua* nisi de minori dotata fuerit ad ostium ecclesiæ;" P. and M. ii 422.

of the older named dowers which the husband could not alienate to the prejudice of the wife.[1] The cause which made the lawyers ready to adopt this reasoning was, as I have hinted, a feeling that the husband's position was sufficiently advantageous. Just as the heir had been secured against the testamentary disposition of his ancestor, so the wife's life interest in a third of any land, which had been part of her husband's estate during the marriage, was secured against any alienation which the husband might make. In both cases a compromise between conflicting claims —between family rights and the right to alienate freely—was embodied in a simple fixed rule. In one respect, indeed, the widow's rights were larger than those secured by the heir. The heir was secured only against the testamentary disposition of his ancestor. The widow was secured against any alienation. Nor was the gift of this larger right to the widow unjust. As we shall see, the law denied her any proprietary capacity during the marriage; it gave all her chattels to her husband, and made him the uncontrolled manager of her realty. Some compensation was due to her.[2]

When the position of the common law dower had been thus fixed, questions naturally arose as to the relations between it and the older named dowers. Notwithstanding the charter of 1217,[3] it very soon seems to have been thought that a woman could not debar herself from her common law rights by an agreement to accept one of these named dowers. This appears to have been the view held in Edward I.'s reign;[4] but probably the question was not clearly settled till early in the fourteenth century. Britton's annotator gives us an interesting discussion of the subject, and the reason for the rule ultimately adopted. "Dower," he says, "was ordained by common constitution of the people and cannot be undone by any single person. For if by one then by another, and so the constitution would be destroyed: *quod non est permissum ne pereat lex approbata.*" [5] To allow a woman to contract herself out of her rights would put her rights at the mercy of the unscrupulous; and this was just the evil which the

[1] Bracton f. 95b.

[2] Below 525-527; cp. Brissaud, Droit Français ii 1657, 1658.

[3] Above 193 n. 6; cp. Bracton f. 94.

[4] Y.B. 20, 21 Ed. I. (R.S.) 142, "*Lowther.*—Even if certain tenements had been assigned to her by her husband, etc., yet it is in her election, after her husband's death, either to take those certain tenements, or to be endowed at common law;" but once having elected she could not change her mind, Y.B. 2, 3 Ed. II. (S.S.) 56.

[5] Britton ii 236-237, note from MS. *N*; it is admitted that "usage of dower is become law," so that "a wife is sufficiently endowed though her husband say nothing;" but what will happen if "the husband protests distinctly and solemnly at the time of the marriage that he does not intend that his wife shall be in any way endowed after his decease, and this is a known and notorious fact?"—the answer, after argument the other way, is that given in the text.

common law dower was designed to prevent. In Edward VI.'s reign her rights were secured also against the claims of the lord or crown to escheat or forfeiture if her husband committed felony; but the old law remained if her husband committed treason, whether grand or petit.[1]

This common law dower soon began to prevail not only over the older named dowers, but also over other older customary arrangements which were once widespread. Some of these customs gave the wife half for life or until she remarried.[2] This may at one time have been the general rule in the case of land held by socage tenure.[3] But, by the time of Littleton, the rule of a third for life, which had originated in the case of land held by military tenure, had been applied by the royal courts to all land held by free tenure. Those who claimed the older customary dowers must allege and prove the custom.[4]

(iii) The modes in which dower may be barred.

The law, by thus securing the widow the right to a third of the land of which her husband had ever been seised during the marriage, pro tanto restricted the husband's right of free alienation. In fact, the widow's right to dower was the one restriction upon the power of free alienation inter vivos in the interest of the family which the common law retained. Even this one restriction soon began to appear irksome; and it is for this reason that the expedients for barring dower take an important place in any account of the history of this subject.

From the earliest period certain modes of barring dower were recognized. The *jus accrescendi*, in the case of joint tenancy, *præfertur oneribus;* and of these burdens the widow's right to dower is one.[5] A wife who eloped lost her dower;[6] and if lands were exchanged the right to dower ceased to attach to the lands given, and began to attach to the lands taken in exchange.[7] By a fine, as I have said, the land could be conveyed free from dower, perhaps because the married woman could be separately examined

[1] 1 Edward VI. c. 12; § 16 allowed her to have dower even if her husband committed treason; but 5, 6 Edward VI. c. 11 § 11 restored the old law in case of treason; Hale, P.C. i 359.

[2] P. and M. ii 423, 424; for a case in which such a special custom was pleaded see Y.B. 6, 7 Ed. II. (S.S.) 53-57.

[3] Bracton f. 93, "Et hæc quæ dicta sunt de tertia parte vera sunt de fœdo militari, nisi aliter observetur de aliqua consuetudine speciali, vel nisi terra teneatur in sockagio, ubi diversimode fit dotis constitutio, vel in gavelkind, vel si sockagium adjungatur fœdo militari."

[4] Litt. § 37.

[5] Y.B. 33-35 Ed. I. (R.S.) 512.

[6] Y.BB. 2, 3 Ed. II. (S.S.) 145; 14, 15 Ed. III. (R.S.) 224.

[7] Y.B. 30, 31 Ed. I. (R.S.) 316, 318; cp. Y.BB. 1, 2 Ed. II. (S.S.) 100; 3 Ed. II. (S.S.) 192.

to see if she had consented;[1] and the suffering of a recovery by husband and wife had the same result.[2]

But these expedients were not sufficient. More efficacious modes were discovered, firstly in the Use, secondly in the trust estates protected by the chancellor in the seventeenth century, and thirdly in the ingenuity of the conveyancers.

(1) We have already seen that jointures given by the more elaborate settlements which the rise of uses rendered possible in the fifteenth century caused the practical disuse of the older forms of dower.[3] The same expedient could be used to defeat the common law dower; for if a man settled his property to his own use, so that he only had an equitable estate, no right to dower attached, because his estate was equitable.[4] When this expedient was resorted to, the wife's right was limited to the jointure[5] limited by the settlement. The Statute of Uses recognized the prevalence of this arrangement, and dealt with it by a provision which added another mode to the existing modes of barring dower. The effect of the statute was to execute the use—that is, to turn the equitable estate of the cestui que use into a legal estate. Therefore if the statute had been silent the widow would have been entitled, not only to the jointure conferred upon her by settlement, but also to dower out of the other estates of her husband which had been made legal estates by the statute.[6] The statute therefore provided that a jointure settled on the wife before marriage should bar her rights to dower, but that, if she were evicted, her common law rights should revive.[7] If the jointure was settled on her after marriage she could elect to take either the jointure or her dower.[8] To have this effect the jointure must be "of lands or tenements to take effect presently in possession or profit after the decease of the husband for the life of the wife at the least."[9] (2) Equity, after some hesitation, departed from its usual rule of following the law. It not only refused to allow dower out of trust estates,[10] but also

[1] Above 193; see below 245 and n. 7 for another explanation of the efficacy of a fine.

[2] Lord Cromwel's case (1601) 2 Co. Rep. at ff. 74a, 74b. For a case in which the earl of Warenne in 1316 surrendered estates to the crown, and took back an estate for life with remainders in tail, in order to bar dower, see Select Cases before the Council (S.S.) lxix.

[3] Above 191.

[4] Doctor and Student ii c. 22; cp. preamble to the Statute of Uses, 27 Henry VIII. c. 10.

[5] As Coke says, Co. Litt. 36b, "A jointure in common understanding extendeth as well to a sole estate as to a joint estate with her husband."

[6] Gilbert, Uses (3rd ed.) 321-337; Bl. Comm. ii 137, 138.

[7] 27 Henry VIII. c. 10 §§ 4 and 5.

[8] Ibid § 7; Butler and Baker's Case (1591) 3 Co. Rep. at f. 27a.

[9] Co. Litt. 36b.

[10] The wife's right to dower was favoured by Jekyll, M.R., in Banks v. Sutton (1732) 2 P. Wms. 700; but in Clapham v. Clapham (1733) 3 P. Wms. 229 it was settled that she was not entitled; Lord Hardwicke in Casborne v. Scarfe (1737) 1 Atk.

invented a new mode of barring it, by holding that property settled on the wife, which would not have been a good legal jointure under the Statute of Uses because it was personal property, might operate in equity to bar dower.[1] Probably the reasons which induced the chancellors to take this course were firstly, analogy to the rule applied to uses before the Statute of Uses, and secondly the fact that the wife's rights inconveniently restricted freedom of alienation.[2] (3) The separation of the ownership of property from the power of disposing of it, rendered possible by the invention of powers of appointment, became, in the hands of the conveyancers and the court of Chancery, the foundation of an efficient mode of depriving the wife of dower, and yet of giving to the husband all the advantages of an estate of inheritance.[3]

These expedients were rendered unnecessary in 1833. The Dower Act of that year put the widow's rights at the mercy of the husband, and thus destroyed this solitary yet long-lived survival from an age when family rights of many kinds fettered alienation.[4] The widow is still entitled to dower, and, by virtue of the Dower Act, out of equitable as well as legal estates; but only out of those estates to which the husband was entitled beneficially at his death, and only if he has not exercised by deed or will his power of taking away her right. The one surviving rule which may remind us of the time when the widow's dower was a real fetter upon alienation is the rule that a legacy to a wife in satisfaction of an existing claim to dower gets priority over other legacies, because the wife can be regarded, not as a mere volunteer, but as a purchaser of the legacy.[5]

at p. 606 admitted that this was the law, though, as he said, it was "hard to find a sound reason for it," see the corrected report of the case in 2 Jac. and W. at p. 199; Lord Mansfield in Burgess v. Wheate (1757-1759) 1 Eden at p. 224 agreed that the law was not founded on reason, but that "wrong determinations had misled in too many instances to be now set right;" cp. Smith v. Adams (1854) 5 De G. M. and G. at p. 720.

[1] Dyke v. Rendall (1852) 2 De G. M. and G. 209, 218, 219, "What was not a legal bar might be made an equitable bar—the ground of this equitable bar being contract;" there was no right as under the statute to have recourse to the common law dower in case of eviction; "if a woman, being of age, accepts a particular something in satisfaction of dower, she must take it with all its faults, and must look to the contract alone, and cannot in case of eviction come against any one in possession of the lands on which otherwise her dower might have attached."

[2] Above 196 n. 4; see Clapham v. Clapham (1733) 3 P. Wms. at pp. 233-234; Smith v. Adams (1854) 5 De G. M. and G. at p. 720.

[3] For the conveyance to uses to bar dower see Williams, Real Property (22nd ed.) 397-398, and for further illustrations of the use made of powers of appointment for this purpose cp. Ray v. Pung (1822) 5 B. and Ald. 561; Maundrell v. Maundrell (1804) 10 Ves. 246.

[4] 3, 4 William IV. c. 105; the Act applies to lands held under the custom of gavelkind; it does not apply to lands of copyhold tenure, probably because it was not required to enable the husband's alienation to destroy the right to dower, see Farley v. Bonham (1861) 2 J. and H. 177-180.

[5] Re Greenwood [1892] 2 Ch. 295.

§ 10. Unfree Tenure

The greater part of the land of England was cultivated by persons who held by unfree tenure. To understand, therefore, the law relating to that tenure we must constantly keep before our minds the main features of the system of agriculture which, as we have seen, prevailed here and elsewhere both before and after the mediæval period;[1] for it was the basis upon which the law rested. But within that system we can see changes which correspond to social and economic changes in the state; and we must take these changes into account, no less than the system itself, if we are to understand the development of the rules of law.

In the oldest documents we see what has been called the farm system.[2] The "farm," which is the same word as the Saxon *feorm* or food, is the amount of produce needed to maintain the lord's household for a certain fixed period; and the system itself goes back to the Saxon period. In Domesday Book a "firma unius noctis" was due from some of the royal manors.[3] Other landowners followed this example. Their estates were let to farm so as to produce a certain quantity of food.[4] Thus the manors of St. Paul's were let in such a way that they produced food for fifty-two weeks and six and five-sixths days.[5] Sir Paul Vinogradoff says, "The practice of arranging the produce rents according to farms was by no means restricted to ecclesiastical management: it occurs also on the estates of the crown, and was probably in use on those of lay lords generally."[6] This system gave place to the system of labour service. The lord managed his own farm by his own officials. They must strictly account to him and his superior officers. The labour was done by the tenants as service due in return for their holdings. As compared with the earlier system it was far more highly organized. The earlier system was somewhat rough and ready. It "was imposed from above without much trouble being taken to ascertain the exact value and character of the tributary units subjected to it."[7] Under the later system a far more uniformly proportionate profit could be made from the land. But it was a system which required an elaborate and detailed organization impossible to a primitive civilization. It was gradually substituted for the earlier system as the great landowners, imitating the centralized organization of the royal court, introduced some

[1] Vol. ii 56-61.
[2] Vinogradoff, Villeinage 301-307.
[3] Domesday Book and Beyond 146; Domesday of St. Paul's (C.S.) xl.
[4] Domesday Book and Beyond 147, citing the Black Book of Peterborough.
[5] Domesday of St. Paul's (C.S.) xxxix.
[6] Vinogradoff, Villeinage 302, 303.
[7] Ibid 306.

of the royal methods of enrolment and accounting into the management of their demesnes.[1]

It is this system which we see prevalent in the thirteenth century; and, as we have seen, it was those tenants whose duties consisted chiefly or wholly in cultivating the lord's demesne who were classed by the lawyers as unfree tenants.[2] It was gradually replaced by a system of money rents. The tenant hires his land of his lord; and the lord cultivates his own land by paid labour, or lets it to a tenant who pays rent.

It is the transition from the second system to the third which occupies the period from the thirteenth to the fifteenth centuries; and the transition necessarily involved a gradual change in the rules of law relating to the tenure of land by the cultivators of the soil. In the earlier period we see a community pursuing a communal system of agriculture, and cultivating by their labour services the demesne of a lord. In the later period we see in many cases a similar community pursuing a similar system of agriculture, but owing only certain customary rents and dues to a landlord. There has been a transition from the relation of lord and villein to the relation of landlord and copyholder.[3]

In dealing with the earlier period it is sometimes difficult to keep apart questions of status and tenure. As we have seen, the man who held by an unfree or villein tenure was often, though not necessarily, an unfree person.[4] Here I shall deal only with villein tenure, leaving to a later chapter the topic of villein status.[5]

We have seen that the technical and legal distinction between free and unfree tenure consisted in the fact that the first was, and the second was not, protected by the courts of common law. We have seen too that this broadly and roughly corresponded with a social and economic distinction between different classes. The courts of common law lumped together all the class of unfree tenants under the comprehensive term "villani." The term itself is characteristic. It is a "Latin record term;" and its victory illustrates the far-reaching effects of the classification effected by the royal courts. A very cursory glance at the

[1] See The Economic Development of a Norfolk Manor 22-25 for a description of the organization of a manor, its relations to the other manors belonging to the same estate, and the duties of the officers of the manor and of the estate, who travelled round, like the king's itinerant justices, keeping the local officials up to their duties and overhauling their accounts. The arrangement was long observed; in a tract upon "the well ordering of an honourable estate or revenue," published in 1624 and written by Tho. Clay, "Surveyor and Student in the Mathematicks," we meet a similar set of officers with similar duties.

[2] Above 31-33.

[3] For the term "copyholder," see below 206 and n. 3.

[4] Vol. ii 202, 264, 577; cp. Y.B. 1, 2 Ed. II. (S.S.) 61.

[5] Below 491-510.

manorial records will show that this class of villani was compounded of many different elements and contained many different classes of persons. Terminology alone shows this. We meet with terms such as servus, nativus, or rusticus, which sometimes imply that the tenant is personally unfree. Sometimes the term "villanus" is used to mean the holder of a plot of normal size, as contrasted with cottarii or bordarii, who held smaller plots. Sometimes terms are used which express the nature of the services due, such as operarii or akermanni, or the incidents of tenure, such as gersumarii.[1]

We see the same thing still more clearly if we look at the leading characteristics of unfree tenure. I have already described the various labour services due. They were elaborately set out in the manorial extents; and they formed the chief characteristic of unfree tenure.[2] But, in addition, the lord was entitled to other incidents of tenure which cannot be explained by the economic needs of the manor.[3] The merchet, which, as we have seen, was often taken as the badge of unfree status,[4] shows that a large number of the personally unfree went to make up the class of villein tenants. The heriot, or sum payable from the chattels of a deceased villein tenant, may represent either the theory that the villein is personally unfree and can own nothing, or the theory that the lord has lent him his stock. The relief on the other hand is, as in the case of land held by free tenure, a payment by the heir for the right to succeed. Then we get a number of privileges possessed by a lord, because as lord he has a certain political authority. He can amerce and fine transgressors in his court if they break the customary rules or the by-laws of the manor.[5] He can tallage his villein tenants —even where the status of the tenant is free.[6] He often has a mill to which all villein tenants must bring their corn to be ground, or a fold in which their sheep must be enclosed. In many cases a villein tenant could not sell his cattle or allow his son to take holy orders without the lord's consent; he cannot

[1] For these terms see Vinogradoff, Villeinage 140-150; the term *akermanni* seems to mean those whose duty it was to follow the demesne ploughs, and the term *gersumarii* to mean those who pay a fine for giving their daughters in marriage, ibid 147.

[2] Vol. ii 370, 379-380, and App. II. to this volume.

[3] For these incidents see Vinogradoff, Villeinage 153-164.

[4] However, it was sometimes paid by free persons, Vinogradoff, Villeinage 155; the same thing applies to other incidents generally thought servile, ibid 201, 202.

[5] Vol. ii 376-377; see Ramsey Cart. ii p. 22 for a curious custom by which the "tota villata" paid 20s. as a composition for certain amercements which its members might incur.

[6] See Y.B. 33-35 Ed. I (R.S.) 338—a lord avowed for nonpayment of tallage in a plea for wrongfully taking cattle; the plaintiff pleaded that she "was free and of free estate," so that she was not liable for tallage; the court, after taking time to consider, adjudged the avowry good.

refuse to serve as reeve, and his youngest son succeeds to his property; and all these incidents, like the incident of merchet, came to be connected with servile status. But, as Sir Paul Vinogradoff has pointed out,[1] "they do not fit well together: the prohibition against selling animals is connected with disabilities as to property, and not directly derived from the personal tie; as for the rule of succession, it testifies merely to the fact that the so-called custom of Borough English was most widely spread among the unfree class. The obligation of serving as a reeve or in any other capacity is certainly derived from the power of a lord over the person of his subject; he had it always at his discretion to take his man away from the field, and to employ him at pleasure in his service. Lastly, the provision that a villein may not allow his son to receive holy orders stands on the same level as the provision that he may not give his daughter in marriage outside the manor: either of these prohibited transactions would have involved the loss of a subject." Thus the various incidents characteristic of unfree tenure come from very diverse sources, and truly represent the diverse origins of the composite class of unfree tenants. The services and incidents were fixed by their enrolment on the court rolls and extents of the manor. As so fixed they represented simply the custom of the particular manor; and therefore there is none of that uniformity about them which is characteristic of the free tenures. Their characteristic is rather that stereotyped diversity which is still the mark of the copyhold tenure of our modern law.

We have already seen to what an extent the enrolment of the villeins' services, the regular keeping of courts, the imitation, conscious or unconscious, of the rules of the common law, and the communal custom of the manor, tended to fix not only the duties of the tenant, but also the rights and liabilities of the lord.[2] The result was a system which seemed to have attained a fixity and stability remarkable even in the Middle Ages. But a series of causes gradually led to a commutation of the old labour services and many of the old incidents of tenure for money payments. The memory of the old economic order lived on only in the names of the customary payments due from the tenant, or in the occasions upon which these payments could be demanded. This transition from the labour-service system to the system of money rents was as gradual, perhaps more gradual, than the transition from the farm system to the labour-service system. Even in the seventeenth century Coke can talk of the "so little Commonwealth" of lord and copyholders.[3] The dependency of the tenant upon

[1] Villeinage 156, 157. [2] Vol. ii 378-381.

[3] Coke, in his epilogue to his tract styled "The Complete Copyholder," says, "And so I conclude with copyholders, wishing that there may be ever a perfect

the manor was loosened; but the manor and its courts remained. A communal system of agriculture[1] and dependency upon a lord, who often possessed a court with a leet jurisdiction,[2] helped to bridge the gap between the mediæval and the modern.

The history of this transition I must now trace. I shall deal firstly with the process of transition; secondly, with the effect of this transition upon the land law; and, thirdly, with the settlement of the position of the copyholder which was effected in the sixteenth century as the result of this transition.

The Process of Transition

The centralized government of England which kept the peace, the insular position of the country which kept it free from foreign invasion, and the rise of the woollen industry, supplied three economic conditions precedent for the transition from a system of natural husbandry to a system of money rents. Owing to these three causes wealth could increase, trade could flourish, and money could become, in consequence, more plentiful. "The consequences," says Sir Paul Vinogradoff, "are to be seen on every side in the arrangements of state and society. The means of government were modified by the economic change. Hired troops took the place of feudal levies; kings easily renounced the military service of their tenants, and took scutages which gave them the means of keeping submissive and well drilled soldiers. The same process took place all through the country on the land of secular and ecclesiastical lords. They all preferred taking money, which is so readily spent and so easy to keep, which may transform itself equally well into gorgeous pageants and into capital for carrying on work, instead of exacting the old-fashioned unwieldy ploughings and reapings or equally clumsy rents in kind."[3]

Even in Domesday Book we can see some rent-paying tenants.[4] In the thirteenth century we see a class of "molmen," "censuarii," or "gavelmanni," who are released from their labour services on condition of paying a money rent, and who, in consequence, often win their way upwards almost to an equality with the free tenants.[5] Again, we see that small portions of the demesne or outlying

union betwixt them and their lords, that they may have a feeling of each other's wrongs and injuries; that this so little Commonwealth having all its members knit together in complete order may flourish to the end."

[1] Vol. ii 378, 392 n. 1; at the court of Castle Combe we find orders made relating to the common fields as late as 1661, History of Castle Combe, 344, 345; for information as to its activities in the eighteenth century see Webb, Local Government, Manor and Borough 75-89.

[2] Vol. i 184-185.

[3] Villeinage 181.

[4] Vinogradoff, English Society 390, 462.

[5] Ibid Villeinage 183-188.

pieces of land are sometimes let to the villeins for a money-rent;[1] and often the extent will state that if the tenant of a plot performs labour services such and such services are due, while, if he pays rent, so much is due.[2] But before the middle of the fourteenth century the process of commuting labour services for rent had not gone far.[3] We find, indeed, that some of the labour services are now and again commuted. The bailiff sells the customary work at a customary rate of 1d. or ½d. a day. But there is no general commutation. The number of "works" sold varies from year to year, and depends on the local and temporary circumstances of the particular manor or district.[4] It is not till after the Black Death that commutation becomes at all general. The havoc wrought among all classes,[5] and especially among the labouring classes, gave a severe shock to the old economic order, and strengthened the existing tendency to substitute the new cash nexus for the old labour-service nexus.

It would be a mistake to attribute too permanent and specific an effect to the Black Death.[6] But it is clear that it did much to break up the solidarity of the existing agricultural organization of the manor.[7] That organization depended for its permanence on two main conditions, firstly, that the labour services demanded were on the whole fair, having regard to the economic conditions of the state; and secondly, seeing the ease with which a villein might escape, that the population, as a whole, had no other more attractive careers open to them if they deserted the manor.[8] Both

[1] Vinogradoff, Villeinage 328-333.

[2] Ibid 307, citing R.H. ii 815a, "dabit 8 solidos per annum pro operibus suis qui solidi poterunt mutari in aliud servicium ad valorem pro voluntate domini;" Ramsey Cart. i pp. 325, 434, 487; ii 32; in the Eynsham Cart. i no. 291 (1253) we have a commutation of a converse kind—the abbot commutes his duty to give a dinner on St. Bartholomew's Day to the men of Bampton for eighteenpence annually.

[3] History of a Cambridgeshire Manor, E.H.R. 417-439; Development of a Norfolk Manor 47, 48; Page, The End of Villeinage in England 45, 46, gives a table showing that out of 81 manors 44 were worked wholly by labour services; on 22 these services supplied half the labour; on 9 they supplied only a small part; and only on 6 were the services abolished.

[4] Development of a Norfolk Manor 47, 48—the increase in the number of works sold between 1273 and 1306 "does not appear to be a consequence of the working of general causes or to indicate an advance toward complete commutation. On the contrary, a close examination of the rolls seems to show that local and temporary causes suffice to explain the change."

[5] The evidence of the wills proved in the London Court of Hustings is clear evidence for London, see Calendar i xxvii, xxviii.

[6] See Vinogradoff, E.H.R. xv 779, 780.

[7] Economic Development of a Norfolk Manor 51-53; E.H.R. ix 438 Maitland says that at Wilburton between 1350 and 1410 the lord has great difficulty in getting new and keeping old tenants, but that he still gets a considerable quantity of works from the old tenants; Page, op. cit. 59-65.

[8] Vinogradoff, Villeinage 158, 159, "Every page of the documents testifies to frequent migration from the manors in opposition to the express will of the landowners. The surveys tell of serfs who settle on strange land even in the vicinity of their former home. It is by no means exceptional to find mention of enterprising

these conditions ceased to exist in the latter part of the fourteenth and in the fifteenth centuries. With the scarcity of labour wages rose. At the same time the growth of manufacturing industries caused a demand for more labour in the towns and even in the villages.[1] The legislature endeavoured to keep down the price of labour by the Statutes of Labourers;[2] and the working of these statutes, the provisions of which tended to become progressively more severe, must have embittered the relations between employer and employed; and the more so because, owing to the economic conditions, the labourers were becoming prosperous, and saw that, but for this legislation, they might be still more prosperous.[3] The proper working of the old system required the willing co-operation of lord and tenant. The tenants now banded themselves together in "conventicles" to resist the demands made upon them.[4] Sometimes they questioned the lord's rights in courts of law, asserting that they were entitled to the privileges of the tenants on the Ancient Demesne of the crown.[5] Tenants all over the country, especially the holders of the smaller plots, abandoned their land for the more profitable occupations either of hired labourers upon the land, or of artisans, or of soldiers of the crown, or of paid retainers of some great lord.[6] Ejection from the tenement, the effectual sanction of the old régime, had now no terrors. Some lords accepted the situation and granted out the land for short terms at a money rent, others tried to insist upon their rights.[7]

landlords drawing away the population from their neighbours' manors. The fugitive villein and the settler who comes from afar are a well-marked feature of this feudal society."

[1] Oman, The Great Revolt of 1381, at pp. 167-182 gives the detailed Poll Tax returns of Hinckford Hundred in Essex; he remarks, at p. 182, on "the enormous proportion of artisans in some of the villages;" "the figures suggest that these places are small industrial centres." In fact the restrictions on communal industry in the towns drove trade into the country; and this tendency was strengthened by the pressure of taxation on a population much diminished by the Black Death, Select Cases before the Council (S.S.) lxxx.

[2] Vol. ii 459-464.

[3] Oman, The Great Revolt 9, citing Piers Plowman ix 330-337.

[4] Ibid 10; Page, op. cit. 55 n. 1.

[5] For Ancient Demesne see below 263-269; the statute 1 Richard II. c. 6 recites that, "Villeins and tenants of land in villeinage withdraw their customs and services from their lords, having attached themselves to other persons, who maintained and abetted them; and who, under colour of exemplifications from Domesday of the manor and villes in which they dwelt, and of wrong interpretation of those exemplifications, claimed to be quit and discharged of all manner of service either of their body or of their lands, and would suffer no distress or other course of justice to be taken against them; the villeins aiding their maintainers by threatening the officers of their lords with peril to life and limb, as well by open assemblies and by confederacies to support each other;" Domesday was the only evidence by which such tenure could be proved, below 264; Hale, Domesday of St. Paul's (C.S.) lvii, lviii, thinks that this is the meaning of this passage.

[6] Page, op. cit. 55, 56; at Wilburton it is chiefly the cottagers who desert between 1350 and 1410, E.H.R. ix 438.

[7] Page, op. cit. 60-64, gives a table showing the progress made by the practice of commutation.

It was while the agricultural system was passing through this transition stage that the revolt of 1381 broke out. It was far from being exclusively a villein revolt. The incompetence of the government; the inquisitorial measures taken to punish the evasion of an unfair tax;[1] municipal disorders caused, sometimes by the hostility of the townsfolk to their lords,[2] sometimes by the hostility of the mass of the citizens to a ruling oligarchy,[3] sometimes by feuds among the ruling oligarchy;[4] the socialistic and communistic teaching of the friars[5]—all combined with the harshness with which some lords made use of the consequences of unfree status, unfree tenure, and the Statutes of Labourers, to produce the sudden outbreak.[6] All districts both in town and country had their special grievances. A spark could cause an explosion because everywhere there was explosive material sufficient. But though the material was all explosive its character in other respects differed from district to district.

Neither the revolt nor its suppression had much effect upon the transition from the labour-service system to the rent-paying system except to accelerate it.[7] We shall see that the legislation which followed the Black Death and the revolt of 1381 affected the question of unfree status rather than the question of unfree tenure.[8] The practice of leasing land for terms of years and of commuting labour service for money payments spread rapidly in the later years of the fourteenth century, and continued to make way after the effects of the Black Death and the peasants' revolt had ceased to operate, simply because the old system was becoming more and more impossible.[9] It is clear from the terms of some of the leases that the lords hoped that this new order would be temporary.[10] In fact, it was irrevocable. The tables printed

[1] Oman, op. cit. chap. ii and App. 4.

[2] E.g. at St. Albans and Bury, Oman, op. cit. 91-96, 105-108.

[3] E.g. in London, Oman, op. cit. 15-17.

[4] Ibid 18, 55, 56.

[5] Sir Charles Oman shows, op. cit. 19-21, that it was the friars with their doctrine of evangelical poverty rather than Wycliffe's Poor Priests who preached revolution.

[6] The Anomial Chronicle of St. Mary's, translated by Sir Charles Oman, op. cit. App. 5, tells us that Sir Simon Burley just before the outbreak had arrested a man at Gravesend as his born serf; "and the good folks of the town came to him to make a bargain for the man;" but he demanded the impossible sum of £300. "And the good folks prayed him to mitigate his demand, but could not come to terms . . . though they said to Sir Simon that the man was a good Christian and of good disposition, and in short that he ought not to be so undone. But the said Sir Simon was of an irritable and angry temper . . . and for haughtiness of heart he bade his serjeants bind the said man and to take him to Rochester Castle to be kept in custody there: from which there came later great evil and mischief."

[7] Tawney, the Agrarian Revolution in the Sixteenth Century 90-91.

[8] Below 500, 503.

[9] Page, op. cit. table at pp. 78-82; the same phenomenon appears at Wilburton after 1410, E.H.R. ix 438; and at Forncett, Development of a Norfolk Manor 57, 58.

[10] Development of a Norfolk Manor 76, 77, and see the series of conveyances relating to a piece of the demesne from 1422-1563 given in App. XI; Page, op. cit. 84, 85; E.H.R. ix 438.

by Mr. Page show us that by the middle of the fifteenth century labour services had been generally commuted for money rents. There were one or two survivals of the older order, but they were only survivals.[1] "With the completion of the transition from prædial services to money rents tenure in villeinage may be said to have come to an end. . . . The essence of villein tenure had consisted in the uncertainty of the tenant's services, and when the old agricultural services were commuted for a fixed money payment this uncertainty passed away."[2] The change is marked by a gradual change in the name of the tenure. Tenure by copy of the court roll tends to replace the old tenure in villeinage.[3] The term "villein" tends to be more strictly confined to persons whose status is unfree.[4]

The Effect of this Transition on the Land Law

We have already seen that the unfree tenant had no locus standi in the courts of common law, but that he was well enough protected by the custom of the manorial court.[5] As time went on, the custom which that court administered tended to become more and more fixed and stable. In the cases which came incidentally before the royal courts it could be pleaded and reasoned upon almost in the same manner as a copyhold custom would be pleaded and reasoned upon at the present day.[6] Indeed, in 1390 it was said that perhaps the king's court might interfere if the lord declined to hold a court for his tenants.[7] But the king's court as yet declined to interfere between lord and tenant. The lord has

[1] For some survivals from the late fifteenth, sixteenth, and seventeenth centuries see Tawney, op. cit. 52-53; at a still later period lessees sometimes covenanted to perform labour services for their landlords, Bk. iv Pt. II. c. 1 § 7.

[2] Page, op. cit. 83.

[3] We see the admission and surrender as early as 1339, Y.B. 13, 14 Ed. III. (R.S.) 102; we see a reference to the "recordum curiæ et rotulum" in a document dated about 1320, Domesday of St. Paul's (C.S.) 156; we get copyholders eo nomine mentioned in Y.B. 42 Ed. III. Mich. pl. 9, "Et trove fuit per verdict que le dit J tient meme le terre del Prior per copy de court roll a volunte le Prior;" cp. the Court Roll of the manor of Forncett for 1400, Development of a Norfolk Manor App. X.; but it probably did not become general till the end of the fifteenth century, as in the sixteenth century Fitzherbert, Nat. Brev. 12c, could say that copyholder "was but a new-found term."

[4] This distinction had always been recognized, vol. ii 202, 264, 577; above 199; but the fact that Littleton § 73 uses the word "tenants," while Coke comments on it as if it were "tenements," see Challis, Real Property (3rd ed.) 25 n, may show that the separation between status and tenure was less sharp when Littleton wrote than in the days of Coke; and this is the more probable if we consider the nature of the settlement arrived at as to the copyholder's position, below 211-212.

[5] Vol. ii 30, 378-381.

[6] Y.BB. 12, 13 Ed. III. (R.S.) 228, 230; 13, 14 Ed. III. (R.S.) 102.

[7] Fitz., Ab. *Faux Jugement* pl. 7, "*Thirning.*—Je vey en bank le roy ou plee fuit pendant en court le seigneur entre deux que fueront al volunte que brief fuit grantz al seigneur al distreindre le seigneur de faire droit entre eux, etc. *Candish.* —Et ceo ne fuit semble a ceo cas, car le seigneur puit estre constrein de faire droit."

the freehold. The tenant cannot question his doings, even indirectly by the writ of false judgment.[1] It is clear, however, that when the labour-service system gave place to the rent system much of the original reason for the non-interference of the royal courts ceased. Protection given by the royal courts would no longer mean an interference with or an enquiry into the agricultural economy of the manor;[2] it would mean only the due enforcement of a bargain, the terms of which could be easily ascertained by looking at the rolls of the manor court. But this change in circumstances would not by itself have led the common law courts to interfere. There were too many precedents which laid it down that such tenants had no interest save at the will of the lord. It was too clear that the freehold,[3] which was acquiring a meaning charged with technical sanctity,[4] was the lord's and the lord's alone. But the conversion of arable land into pasture, which seemed to be leading to the depopulation and devastation of the country, and the high-handed proceedings of the lords, who took advantage of the uncertainty of the terms of the tenure under the new leases granted to tenants, made some interference necessary in the public interest.[5] Much of the old communal feeling upon which the custom of the manor rested had been destroyed. Rules and observances which were clear enough to persons who were accustomed to the social and economic conditions of the old order badly wanted definition when they came to be applied

[1] Fitz., Ab. *Faux Jugement* pl. 7. [2] Above 33.

[3] Fitz., Ab. *Faux Jugement* pl. 7, the following statement was accepted by the court, "La custume de maner et la nature de tenancy est tiel que ceux del maner teignent lour terres forsque al volunte le seigneur, et ils et lour heires serra inheritez al volunte de seigneur solonque la custume del maner, issint que les tenants or n'ont riens forsque al volunte le seigneur, et le franc-tenement est en le seigneur."

[4] Vol. ii 354, 581.

[5] For a case of 1553 see Inhabitants of Whitby v. York, Select Pleas in the Court of Requests (S.S.) 198-201; for a case of 1504 turning upon an oppressive action of the Duke of Buckingham, see L.Q.R. ix 364 n. 1; on the whole subject see E.H.R. viii 684-696; it must have been sometimes difficult to distinguish between the tenant at will at common law and the copyholder, owing to the uncertain practice in letting the land at the end of the fourteenth and the beginning of the fifteenth century, below 210 n. 2; of course, when once the character of the letting had been ascertained the legal distinction was clear, Litt. § 82. Prudent landlords sometimes got surrenders from their copyholders, and turned them into tenants at will, see Select Pleas in the Court of Requests (S.S.) 81 for such action of the abbot of Ramsey; and the lords were able the more easily to do this because the copyholders, impoverished by the ravages made by the armies who fought the wars of the Roses, could not fulfil their liabilities, see extract from the proceedings of the Court of Requests cited by Cunningham, Industry and Commerce i 455 n. 8. Probably the action taken by landowners at this critical period influenced the whole future interest of their property, cp. P. and M. i 386, 387; it made all the difference to the lords whether their lands were let permanently to copyholders at fee farm rents which came to be ridiculously low (below 212), or whether they were let merely for life or years at common law. As we shall see (below 257-259) the rule was not yet quite recognized that the lord could not convert one tenure into another, or change as he pleased the customs of old annexed to certain lands.

under other conditions, and by persons who wished in their own interest to put another meaning upon them. What served well enough when the will of the lord was substantially in agreement with the custom of the manor no longer served when the will of the lord and the custom of the manor pulled different ways.

Under these circumstances it is not surprising to find a petition from the copyholders of the manor of Winkfield to the council against the Abbot of Abingdon as early as 1394;[1] and to learn that the first interferences on the part of the government in the relation of lord and copyholder come from the Chancery in Henry VI.'s reign.[2] As we have seen, the Chancery at this period was intimately connected with the council;[3] and it was the council which was responsible for maintaining the peace and wellbeing of the country. Moreover, we have seen that there was a constant tradition from the thirteenth century to Coke that the lord had certain equitable powers in dealing with his copyholders. Lawyers were familiar with the idea that the copyholder could petition his lord to do justice.[4] A petition to the chancellor, who was coming to be connected with cases which demanded equitable interference, would not be a very startling innovation. But we have seen also that the extension of the jurisdiction of the Chancery was beginning to excite the jealousy of the common lawyers;[5] and some recommended that the competition of the chancellor should be met by a greater liberality in allowing actions of trespass on the case.[6] We shall see that the pursuance of this line of policy won for the common law courts a jurisdiction over the law of contract, which might otherwise have slipped from their grasp.[7] It is not surprising, therefore, to find that in 1467 and in 1481 we get dicta to the effect that the interest of the copyholder might be protected by that action. In 1467 Danby, C.J., said, "If the lord ousts his [copyhold] tenant he does him a wrong, for his tenant is as well inheritor to have the land to him

[1] Select Cases before the Council (S.S.) 82-85, and Introd. ciii-iv.

[2] Copyhold Cases in Early Chancery Proceedings, E.H.R. xvii 296-303, by Alexander Savine; the earliest case cited by Mr. Savine is February 4th, 17 Hy. VI. Mr. Savine shows that Mr. Leadam dates the protection given by the royal courts too early; on the other hand, Mr. Leadam shows that Professor Ashley places it too late, E.H.R. viii 684-696.

[3] Vol. i 401-402, 404; for a case which came before the council in 1462 see Select Cases before the Council (S.S.) 114-115, and Introd. cxvi-vii.

[4] Vol. ii 384; Fitz., Ab. *Faux Jugement* pl. 7, *Thirning* and *Cheriton* agree with *Rykyll* that, "Vous naver autre remedy en ceo cas mes de suer al seigneur que ad le franc tenement per peticion." King and council set a good example. We find in 1443, in the proceedings of the council, that when Henry VI. succeeded to certain manors of Lord Tiptoft, he granted out new leases to copyholders on the old terms, Nicolas v 245, 246.

[5] Vol. i 459.

[6] Y.B. 21 Ed. IV. Pasch. pl. 9 (p. 23), *per* Fairfax, J.

[7] Below 424.

and his heirs according to the custom of the manor as any man is to have his lands at common law."[1] In 1481 Brian, C.J., said, in answer to counsel, who had contended that if the lord ejected a copyhold tenant the tenant had no remedy because he held at will, "That was never my opinion, and I believe never will be, for then every copyholder in England would be ousted, wherefore I understand that always if he pays his customs and services, and the lord ousts him, he will have an action of trespass on the case against the lord."[2] How far these dicta were acted on at the end of the fifteenth century could only be ascertained by examining many plea rolls.[3] Littleton would have approved of them as being in accordance with public policy;[4] but he does not venture to affirm any such rule of law. They were, however, incorporated into Littleton's text in 1530. As so incorporated they were commented on by Coke, and thus became legally authentic facts of English legal history. On the whole, having regard to the action of the Chancery, and to the relations between the Chancery and the common law, it is not improbable that there were many judges prepared to act upon them.

It was decided in 1588 that the lessee of a copyholder could maintain ejectment.[5] The result of this decision was to give the copyholder protection by the same form of action as that which had come to be generally used by the freeholder,[6] and thus to effect a unification and simplification of the remedies open to these two different classes of landowners.

The Settlement of the Position of the Copyholder

It was not till the sixteenth century that the legal position of the copyholder was settled; and as the amount of land held by this tenure was large,[7] its settlement was a work of considerable difficulty. All the causes which had called for the interference of the Chancery under Henry VI. and Edward IV. were present during this century in increased strength. It was the century of transition from mediæval to modern; and the difficulties caused by the change from the old order to the new were further increased by the fact that the growing demand for wool caused the conversion of an ever-increasing quantity of land from arable to

[1] Y.B. 7 Ed. IV. Mich. pl. 16. [2] Y.B. 21 Ed. IV. Mich. pl. 27.

[3] See L.Q.R. vii 174.

[4] § 77, "The lord cannot break the custom which is reasonable in these cases;" § 82, "The custom of the manor in some cases may aid him to bar his lord in an action of trespass, etc.;" vol. ii 581-582.

[5] Melwich v. Luter (1588) 4 Co. Rep. 26a.

[6] Bk. iv Pt. II. c. 1 § 1.

[7] "For as much as great part of the land within the realm is in grant by copy," Heydon's Case (1584) 3 Co. Rep. at f. 8b.

pasture.[1] The substitution of money rents for labour services had caused a very general uncertainty as to the terms upon which many of the tenants held their lands.[2] Hence the landowners attempted not only to enclose common land, but also to evict their tenants. Such attempts become common under the extravagant government of the earlier years of Henry VIII.'s reign;[3] and the tendency in this direction was not diminished by the confiscation of the monastic lands. As Leadam says,[4] "The transfer occurred at a moment when the impoverishment of the landlords by foreign wars, taxation, and extravagance, and the enrichment of the commercial classes in a period of internal peace, had created a new order of men whose instinct was to become possessors of land and to treat their acquisitions not simply as an accession of feudal dignity but as an investment to be made remunerative." It was not without aid of the legislature, royal commissions, and the action not only of the courts of common law, but also of the courts of Chancery, Requests, and the Star Chamber that the conflicting rights of landlords and tenants were settled and the position of the copyholder ascertained.

Many statutes were passed to prohibit the conversion of arable into pasture, and to stop the "pulling down of towns," and the depopulation which this process involved.[5] A royal commission was appointed in 1517 to deal with the question of enclosures.[6] The court of Chancery still continued to exercise an active jurisdiction in copyhold cases;[7] and, by the admission of the courts of common law themselves, gave remedies which they could not

[1] Cunningham, History of Industry 362, 468, 469; Royal Hist. Soc. Tr. vi 170.

[2] Page, op. cit. 85, 86. At Forncett we get a period when the demesne as well as the land of the unfree tenants is leased on short terms, before the period when the demesne is let as copyhold at a free farm rent, and conveyed in the manor court like copyhold, Development of a Norfolk Manor 57, 76 and App. XI.; the novelty of these lettings was sometimes fatal to tenants who claimed the privileges of copyholders, see Foreacre v. Frauncys (1544) Select Cases in the Court of Requests (S.S.) 169-172; Abbot's Ripton v. St. John, ibid 99-101; above 207 n. 5; below 212.

[3] More, Utopia, "Your shepe that were wont to be so meke and tame and so smal eaters, now, as I heare saye . . . consume and destroye and devoure whole fieldes, howses, and cities."

[4] Select Pleas in the Court of Requests (S.S.) lvi; see Royal Hist. Soc. Tr. vi 189-191 for the enclosures made by the Duke of Buckingham. A good illustration of what had been going on is afforded by D'Ewes' address to his tenants in 1631; he tells them that his father had taken a fine of two years' value on alienation and death —but in so doing, "he dealt not justly and equally; for he was a purchaser at a very dear rate: and besides some of you know that the fines and casual profits were warranted to him that they should amount unto £100 yearly for certain years after his purchase, so that he was thereby necessitated to take the same rates and follow the same proportions, which had been formerly observed," Autobiography ii 35.

[5] For an account of this legislation see Bk. iv Pt. I. c. 1.

[6] See the Domesday of Enclosures, edited by Leadam, Royal Hist. Soc.

[7] It would appear from the Plumpton Corr. (C.S.) 238, 240, that copyholders in Henry VIII.'s reign were very ready to appeal to the chancellor if they thought that they were being oppressed by their lords.

give.[1] In addition to the court of Chancery, the court of Requests and the Star Chamber were appealed to by both lords and tenants. In fact, as many of these cases show, on the settlement of the position of the copyholder the peace and prosperity of the state to a large extent depended. It is well to remember that the unremedied grievances of French peasants, who held by a tenure very similar to copyhold tenure, were among the most powerful causes of the first French Revolution.[2] The strong government of the Tudors acting through the Council, Parliament, and all the courts new and old, did much to remedy the grievances of the copyholder, and to convert the copyholders' interest into a form of property, inconvenient it may be, but still a form of property of considerable value to the copyholder. And, if we can believe Roger North, the position of the copyholder was not improved when, in the latter half of the seventeenth century, the strict control of the central government was relaxed.[3] In fact the change thus effected was similar in its nature to the change which was taking place in respect to land held by the free tenures. In both cases the purely proprietary aspect of land-holding was emphasized, and the effects and consequences of tenure were diminished. No doubt the process was less complete in the case of copyhold; but its tendency was in the same direction.

In effect the settlement arrived at proceeded somewhat on the following lines: If the copyholders held land which was anciently copyhold, the lords were compelled to respect the customs of the manor and the terms of the tenure.[4] On the other hand, the rule was enforced that no land was copyhold unless it was so by prescription.[5] Copyhold tenure, like the manor itself, must be time out of mind. This secured the tenants of lands anciently copyhold, who had perhaps been on the land for generations, and left the lord free to develop as he pleased other parts of his property which could not be proved to have been anciently let as copyhold. In this way the lord retained a free hand over his demesne, and over such parts of the waste as he had enclosed, provided that he obeyed the statutes relating to enclosures, and provided that he left sufficient common not only for the freeholders but also for the copyholders, a decision in the reign of Elizabeth having

[1] It was held in Ford v. Hoskins (1615) Cro. Jac. 368 that an action would never lie against the lord of a manor who refused to admit a copyholder, but that he might obtain relief in Chancery.

[2] Maine, Early Law and Custom 299 seqq.

[3] Lives of the Norths i 31; cf. Tawney, the Agrarian Problem in the Sixteenth Century 397-400.

[4] Inhabitants of Whitby v. York, Select Cases in the Court of Requests (S.S.) (1553) 198; E.H.R. viii 690, 691.

[5] Litt. § 73; E.H.R. viii 688, 689; Kent and others v. Seynt John, Select Cases in the Court of Requests (1543-1544) 64; Foreacre v. Frauncys (1544) ibid 101.

brought the copyholders within the statutes of Merton and Westminster II.[1] Thus the copyhold tenant got a fully-protected interest in the land on the terms upon which his services had been commuted in the fourteenth or fifteenth centuries. He was fortunate in being thus able to hold upon terms settled at so early a date. The general fall in the value of money which took place towards the end of the sixteenth century caused these fixed payments to be much less than the real value of the land. And so the copyholder got a substantial interest in the land, which interest is really, as Maitland has said, "an unearned increment, the product of the American mines."[2]

No doubt in individual cases it depended a good deal upon chance, or upon the action of lords in the fourteenth and fifteenth centuries, whether a given piece of land became copyhold or not;[3] and this uncertainty gave rise in the sixteenth and seventeenth centuries to litigation,[4] and even in one case to legislation.[5] At the same time we cannot doubt that in many cases copyhold was really anciently copyhold, i.e. land originally let upon an unfree tenure. The rule that copyhold must be by prescription was a rough working rule which made for a fair settlement of the conflicting claims of lords and tenants. The rule itself cannot be proved to be universally true—in individual cases it is certainly untrue. Technically, it is one instance of the comparatively new doctrine which forbade lords to change at their pleasure the quality of the tenure of their lands and the customs upon which they were held.[6] But the rule is more than a mere technicality. It has some facts behind it. Like the distinction drawn in earlier days between free and unfree tenure it rested on a basis of fact, it made for peace between conflicting interests, and it had important effects upon the fabric of the law.

We shall see that the courts of common law gradually assimilated the law of copyhold tenure to the law of free tenure, statutory and otherwise, in so far as that law did not conflict with the custom of the manor.[7] Thus tenure by copyhold became merely a form of land-ownership, without servile taint. A father

[1] For these statutes see above 147; Bk. iv Pt. I. c. 1; Leadam, Select Cases in the Court of Requests (S.S.) lix, says that he has a note of such a decision, but that he has not been able to verify it; cp. Williams, Commons 123.

[2] E.H.R. ix 439.

[3] Above 207 n. 5.

[4] Cullyer v. Knyvett (Ed. VI.) Calendars of Chancery Proceedings (R.C.) i cxxxvii-ix; Hutchings v. Strode (1635) Nels. 26.

[5] A statute was passed in 1548, 2, 3 Edward VI. c. 12, to validate certain demises of land to be held as copyhold which had been made by the Duke of Somerset, which demises were not valid, as the land was not anciently copyhold; cp. also Lords' Journals, July 15, 1536, where there is mention of "Billa quod homines suas terras possidere debeant et gaudere in quibus Dominus Rocheforde, Henricus Norreis et alii seisinam habuerunt."

[6] Below 257-259.

[7] Bk. iv Pt. II. c. 1 § 8.

could settle copyholds on his daughters in consideration of natural love and affection, just as he might settle any other form of property;[1] for, as Coke says, "in the point of service a man can scarce discern any difference between freehold lands and copyhold lands."[2] The differences had become merely historical. The wise settlement arrived at in the Tudor period affords abundant justification for Coke's eloquent comparison between the present and the past condition of the copyholder.[3] Time had indeed dealt very favourably with copyholders in divers respects.

§ 11. The Term of Years

We have seen that in the twelfth century the lawyers were led, by an unfortunate application of the Roman law of possession, to deny any seisin to the lessee for years.[4] The lessee may, it is true, repel force by force; he may, that is, resist the would-be ejector if he can;[5] but all the legal remedy he has is a personal action against his lessor on the covenant, by which he may recover damages or, if the term has not expired, possession of the land leased.[6] As against third persons he has probably no remedy at all.[7] An ejectment by a third person is a wrong to the freeholder, and it is the freeholder, therefore, and the freeholder alone, who can bring the assize of novel disseisin. The lessee's right is a jus in personam, and not a just in rem. It followed from this that his rights were postponed to the rights of third persons who could claim some interest in the freehold. If

[1] History of Castle Combe 336, 337—a settlement in 1631 by the lord of the manor on his two daughters of customary land, "Reddendo domino . . . xxxiis. ac omnia alia opera, onera, consuetudines et servitia inde prius debita et de jure consueta, et pro herietto, cum acciderit, pro prædicto messuagio et virgato terræ . . . suum optimum animal."

[2] Complete Copyholder § 7.

[3] § 9, "But now copyholders stand upon a sure ground, now they weigh not their Lord's displeasure, they shake not at every sudden blast of wind, they eat, drink, and sleep securely; onely having an especial care of the main chance (viz.) to perform carefully what duties and services soever their Tenure doth exact, and Custome doth require: then let Lord frown, the copyholder cares not, knowing himself safe and not within any danger. For if the Lord's anger grow to expulsion, the Law hath provided several weapons of remedy; for it is at his election either to sue a *Subpœna* or an action of trespass against the Lord. Time hath dealt very favourably with Copyholders in divers respects."

[4] Vol. ii 205.

[5] P. and M. ii 106.

[6] Ibid n. 2; Y.BB. 32, 33 Ed. I. (R.S.) 474; 11 Hy. VI. Mich. pl. 11; 33 Hy. VI. Mich. pl. 19.

[7] As we have seen (vol. ii 364) the action of trespass did not become general till late in the thirteenth century. The old view which put the writ de ejectione firmæ before the Quare ejecit is clearly impossible, P. and M. ii 109 n. 1; we may observe that in Y.B. 2, 3 Ed. II. (S.S.) 86 *Herle, arg.*, thus states the law, below 214.

the lessor died leaving an infant heir or a widow, the lessee's rights were inferior to those of the guardian in chivalry or the dowress.[1]

But in spite of the reasonings of the lawyers, the inconvenience of holding that the lessee for years had merely a personal right made some change in the law imperative. Accordingly the remedies of the lessee were gradually improved. As we have seen, about 1235 William Raleigh invented the writ *Quare ejecit infra terminum.*[2] Bracton seems to have thought that it would lie against any one who ejected the lessee;[3] but a little later it is clear that it had not this extensive effect. In its final form this writ only applied to the case where the lessor had sold the land to another who had ejected the lessee. "Under the old law," said Herle in 1309, "I should have no recovery against any one but my lessor, no matter by whom I were ejected; and because there was hardship in the case when the lessor had nothing, remedy is granted against my ejector by the writ 'occasione cujus venditionis, etc.'"[4] In 1278 the Statute of Gloucester protected the lessee from losing his term in consequence of a collusive use of a real action. If the lessor procured some third person to sue him, and allowed judgment to go by default, the lessee had formerly no remedy. The statute allowed him to intervene to protect his interest.[5] As against ejectors in general the lessee was protected, certainly from Edward II.'s reign onwards, by the action of trespass, which in the form applicable to him came to be known as the action of *ejectio firmæ.*[6] But we should note that he could only recover damages in such an action, whereas by an action on the covenant or by the *Quare ejecit* he might recover the land itself.[7]

We have seen that when the legislator of the thirteenth century wanted to provide an efficacious remedy he often extended the scope of the assize of novel disseisin.[8] The question arises, Why was not this course taken in the case of the lessee for years? As Maitland points out, we cannot explain this by saying that

[1] P. and M. ii 107—if ejected by the guardian his rights revived when the ward came of age: if ejected from a third by the widow he held the other two-thirds for a longer period as compensation.

[2] Vol. ii 231; for the writ in its final form see App. Ia (14); this writ and that of covenant were alternative, Y.B. 30, 31 Ed. I. (R.S.) 282.

[3] f. 220, "De consilio curiæ provisum est firmario contra quoscunque dejectores per tale breve."

[4] Y.B. 2, 3 Ed. II. (S.S.) 86—the writ is the Quare ejecit, the operative effect of which had been narrowed by the insertion of the words cited by Herle; the law is so stated by Fleta 4. 31. 4; cp. Y.B. 6 Ed. II. (S.S.) 222-223, 226-227.

[5] 6 Edward I. c. 11; supplemented by 21 Henry VIII. c. 15; Co. Litt. 46a.

[6] Y.B. 15 Ed. II. Hil. ff. 458, 458b; for later cases see Y.BB. 12 Hy. IV. Mich. pl. 20; 1 Hy. V. Pasch. pl. 3; Fitz., Ab. *Ejectione Firmæ* pl. 2 for a case of Richard II.'s reign; 32 Hy. VI. Hil. pl. 27; and cp. Maitland, Forms of Action 350-351; for the writ see App. Ia (15).

[7] Y.B. 33 Hy. VI. Mich. pl. 19.

[8] Above 10.

such leases were rare, nor by saying that such lessees were mere farmers or bailiffs.[1] On the contrary, large sums of money were sometimes invested in leases; for a beneficial lease was, as we have seen, one of the modes by which money could be raised on the security of land and a fair rate of interest secured for the lender without his incurring the guilt of usury.[2] Moreover, it was quite clear, as a result of thirteenth-century legislation, that the lessee for years had something much more than a mere personal right as against his lessor. "Men do not say, lawyers do not say when they are dealing with concrete cases, that he has the benefit of an obligation, nor that he has a usufruct, nor that he has a servitude comparable to a right of way; they say boldly that he holds a tenement."[3] Thus Fleta says,[4] "a man should not be able to eject a lessee from his farm any more than any other tenant from his free tenement. Hence if a man should eject a lessee from his farm he must restore to him his seisin together with damages, because such spoliation differs not much from disseisin." The lessee, then, has a real right; but probably this real right was not given the protection of the real actions because, if it had been so protected, it would have been difficult to say that the lessee's interest was not a freehold like the interest of the tenant for life. His interest was not a freehold. It was a chattel interest;[5] and if we regard these leases as being primarily investments of capital, we shall see that there was a very good reason why lessees should prefer that their interests should be thus regarded rather as chattel than as freehold interests. Being chattels, they were capable of being bequeathed; and, as Maitland says, "It is natural that a man who has put a big sum of money into an investment should wish for the power of bequeathing that investment. It is an utterly different thing from the landed estate which one would wish to keep in one's family."[6] Thus the interest of the lessee for years was treated as a chattel interest because the lease of the thirteenth century was as often an investment of capital as the letting of land to a farmer. As Maitland has shown, it is comparable from this point of view to the feudal incidents of wardship and marriage, in the purchase of which large amounts of capital were invested. These rights, like the interest of the lessee for years, were chattel interests and therefore bequeathable like chattels.[7] But it is clear that if this

[1] P. and M. ii 113. [2] Above 128. [3] P. and M. ii 113.

[4] "Non enim potuit aliquis firmarium ejicere de firma sua, magis quam tenentem aliquem de libero tenemento suo. Et unde si quis firmarium a firma ejecerit seisinam restituet cum dampnis, quia talis spoliatio non multum differt a disseisina," 4. 31. 4; cp. Pollock and Wright, Possession 48-49.

[5] Y.B. 33-35 Ed. I. (R.S.) 164; vol. ii 354-355. [6] P. and M. i 116.

[7] Ibid. 115-117; cp. Y.B. 6 Ed. II. (S.S.) 174, where it is pointed out that the right to the wardship goes with the land, but that when the person entitled got

is the view taken of the interest of the lessee for years, the existing remedies protect him well enough. It really does not so much matter to him that he has only a personal action against his lessor, and that he can only get damages by means of the writ of trespass. It is his capital he wants, not the land; and for the loss of his capital damages are an adequate compensation. There was therefore no reason why the real actions should be extended to the lessee for years; and there was some reason why they should not be extended. If there had been a substantial reason why they should have been extended to him no doubt they would have been so extended. We have seen that the tenant by elegit was protected by the assize of novel disseisin though he had but a chattel interest;[1] and the reason for this is plain. The fact that a creditor has elected to take the land in execution is pretty clear evidence that the debtor has not sufficient chattels to pay his debts, and that therefore a personal action against him would be useless.

We have seen that as late as 1455 the established rule that in an action of *ejectio firmæ* the lessee could only recover damages was restated.[2] But in 1468 and 1482 this rule was denied, and it was said that the lessee for years could recover by this action not only damages but also the land itself;[3] and the law was finally fixed in this way in 1499 by a decision of the Common Pleas which was confirmed by the King's Bench.[4] The reasons why this change was made were partly legal and partly economic. We have seen that the machinery of a term of years had ceased for technical legal reasons to be employed in the creation of a mortgage.[5] Therefore the beneficial lease for this purpose went out of use. We have seen that the decay of the labour-service system was the cause of a great extension in the practice of letting the land to lessees for years for longer or shorter terms.[6] It is quite clear that such lessees, if ejected, would not have been compensated adequately if they had only been given damages. We have seen, too, that the government desired to stop the depopulation of the country caused by the conversion of arable land into pasture for sheep.[7] It is obvious that a rule

seisin it was a chattel in his hands; for specimens of grants of these interests see App. VI.

[1] Above 131. [2] Above 214 n. 7.

[3] Y.BB. 7 Ed. IV. Pasch. pl. 16, "Il (*Fairfax*) disoit expresse que en *Ejectione Firmæ* et *Quare ejecit infra terminum*, si le terme ne soit passe, le plaintif recovera son terme et damages pur le temps que l'autre ad occupy. . . . *Brian* a mesme l'entent;" 21 Ed. IV. Mich. pl. 2, "En *Quare ejecit infra terminum*, *Ejectione firmæ* et ejectment de gard home est a recoverer possession et ses damages auxi," *per* Hussey, J.

[4] F.N.B. 220 H.; Reeves, H.E.L. iii 178; Maitland, Forms of Action, 350.

[5] Above 130. [6] Above 205. [7] Above 210.

that the ejected lessee could not recover the land would have facilitated the operations of the landlords, who were pursuing this undesirable policy. These were no doubt the decisive reasons which brought about the enlargement of the remedy which could be obtained by the writ of *ejectio firmæ.*

If, in an earlier period, the power of the lessee for years to bequeath his land by will made his position preferable to that of the freeholder, in a later period the convenience of the action by which he was protected gave him an advantage almost equally great. The writ of *ejectio firmæ* and the action of ejectment to which it gave rise won their greatest victory in the following period when, by a series of legal fictions,[1] they were made to do the work of the real actions so efficaciously that they gradually reduced them to the rank of antiquarian curiosities. We have seen that by that date the writ and the action had also become available to the copyholder,[2] so that through them the common law at length acquired a uniform remedy for the protection of all kinds of interests in land.

The law relating to these chattel interests borrowed from the law relating to freehold some of the principles of tenure,[3] some of the rules which gave the landowner power to create estates in the land, and some of the rules applicable to covenants running with the land.[4] But in the long run it is probable that it is the law relating to freehold which is the debtor to the law relating to chattels real. If we look at the capacity of the chattel real to be bequeathed, at the remedy ultimately devised for its protection, and at the machinery by which it devolved upon the next-of-kin or the legatee, we shall see that it has been an example, tardily followed, but for all that followed, by the law relating to freehold. The interest of the lessee for years is and always has been merely private property. It is but natural that the principles applicable to his interest should exercise a greater and greater influence upon the interest of the freeholder as his interest also comes to be regarded more and more as simply a form of private property.

§ 12. The Modes and Forms of Conveyance

In the preceding sections I have been describing the theory of the land law. I have said something of the shape which it had taken under the influence of the procedural forms of the common law, working upon a basis of feudal and customary rules; of the

[1] Bk. iv Pt. II. c. i § 1. [2] Above 209.

[3] See Y.B. 5 Hy. VII. Hil. pl. 2 *per* Fairfax as to the tenure between lessor and lessee, and the fealty due; because there was a relation of tenure, the lessor had the remedy of distraint, Litt. § 58.

[4] Bk. iv Pt. II. c. 1 § 7.

quality and quantity of the interests which different kinds of tenants can have in the land; of the powers possessed by these different kinds of tenants. In this section I shall deal with the history of the modes in which tenants were able to give practical effect to their powers of disposition. Both in the Public Records and in the cartularies of religious houses there are numerous documents, both printed and unprinted, which either evidence or actually accomplish all the various dealings with the land which were possible during this period.[1] These documents show us the actual everyday working of the principles of the land law. They show us also how its principles became fixed and settled by their application to the concrete needs of individual landowners. In the application of the general principles of the law to these countless concrete cases we see the legal profession at work out of court, just as in the Year Books we see it at work in court, settling the knotty problems which changes in social needs and restless human energy continually set to the general principles of the law. And, just as the theory of the law has been built up out of the solutions of these problems by the lawyers in court, so much of the detailed working out of the theory of the land law has been built up by these same lawyers, who, out of court, devised forms which have enabled landowners to give effect to their wishes in accordance with the general principles of the law. In both cases the application of the law to individual cases has shaped and hardened its rules; and though no doubt the activities of the conveyancers have always been exercised under the control of the courts, though the courts have always been the ultimate arbiters as to the validity and the interpretation of the forms which they employ,[2] yet there can be no doubt that these draftsmen of conveyances have, from early times, had a great and an independent influence upon the law. They have made common forms; and the common forms, whether of writs or of pleadings or of conveyances, have a habit of acquiring a customary meaning from which the court will not readily depart, and of thus becoming a part of the law itself.[3] With the growth of the complexity of the law, and therefore of the forms which were devised to give effect to it, there has grown up a respect for the opinion of those who have constructed these

[1] A very complete collection of mediæval charters of all kinds is to be found in Madox, Formulare Anglicanum; they are drawn from the Repository of the Augmentation Office, from the Cottonian Library, from the Collegiate Church of Westminster, from the Cathedral Church of Canterbury, from the library of Corpus Christi, Cambridge, and from the Pipe Rolls; in later days the same motives which led in earlier times to enrolment on the Pipe Rolls led to enrolment on the Close Rolls, below 235; while for conveyances which were effected by the machinery of the court we have the Feet of Fines; for these various rolls see vol. ii 181-186; in the last century many cartularies have been published in the Rolls Series, and in the works of many learned societies; for some specimens of early forms see App. III.

[2] Below 252-253.

[3] See below 642 as to pleadings.

forms which more nearly approaches to the respect paid in the days of the Republic to the Responsa Prudentum than anything else in English law.[1] In this period, it is true, we are only at the beginning of the process which will make the opinion and practice of the conveyancers almost a source of law. There were many learned amateurs in the monasteries who drew conveyances according to the pattern approved of by the monastery.[2] We can, however, see the beginnings of the process which will eventually lead to this result.[3] Any collection of precedents will show us a growth of uniformity and complexity which points to the rise of a class of professional conveyancers.

Though we cannot in this period ascribe to the practice of conveyancers that authority which it afterwards attained, we can see that from another cause, the work of the conveyancer occupied a more important place in the common law of the Middle Ages than it occupies in subsequent periods. As I have already pointed out, the land law occupied a larger space in this period than any other branch of the law.[4] Many arrangements took the form of a conveyance of an incorporeal thing which to-day would take the form of a simple contract, written or verbal.[5] For this reason these conveyancing precedents shed much light on branches of the law which to-day hardly come within the scope of the conveyancer's art; so that a knowledge of the forms which the conveyancers of this period employed is more necessary than in later days to a proper understanding of the law as a whole.

In this section I shall deal, firstly, with the history of the forms of conveyance; secondly, with some of the modes in which landowners were able to deal with their land by these means; and thirdly, with the light which some of these mediæval conveyances shed upon the development of the law.

The History of the Forms of Conveyance

The bold simplifications in the land law effected by royal justice are very apparent if we compare the law of conveyancing

[1] It may be useful to note that Acts like the Conveyancing Act and the Settled Land Acts in some of their sections codify the practice of the conveyancers, just as Acts like the Sale of Goods Act codify case law. In the manner in which such covenants as covenants for title, devised by the conveyancers and formerly expressly inserted in every conveyance, have come to be implied, we may note an historical development closely paralleled by the development of the contract *Emptio Venditio* in Roman law, see Moyle, Contract of Sale 111, 112, 192-195.

[2] "It is most certain that the cloisterers in making their leases and deeds had commonly a peculiar form thereof which they would stick to so precisely, that rather than deviate from their custom they would mar the whole," Plowden at f. 163.

[3] Note that in 1312-1313 the lawyers who practised before the courts were employed to draw fines, see Y.B. 6 Ed. II. (S.S.) 197 note from the record.

[4] Vol. ii 590. [5] Ibid 355, 356.

in England with that observed in France. The French lawyer who was dealing with conveyancing in mediæval times must make many divisions and distinctions. He must consider the *franc alleu*,[1] the fief, and the *censive*[2] in town and country. He must put the rules prevailing in the *pays du droit écrit* in a class apart from the rules prevailing in the *pays du droit coutumier*;[3] and when dealing with the latter class he must consider various special customs and exceptions.[4] He must consider the influence of Roman law, which, in different places and with different degrees of strength, was making for the transfer of property by means of written instruments.[5] He must consider the various *retraits* of lord and heir,[6] which, by affecting the security of the purchaser, sometimes had an influence on the form of conveyance which it was advisable to adopt.[7] The English lawyer, from the thirteenth century onwards, was not troubled by any question of *retrait*; freedom of alienation was, as we have seen, the rule.[8] The growing uniformity of the rules of law applicable to lands of free tenure necessarily caused a growing uniformity in the forms of conveyance. We must, it is true, make distinctions between land held by free tenure on the one side and land held by copyhold tenure and for a term of years on the other. But, as we have seen, many of the rules and principles of law applying to land held by free tenure came in time to be applied to the other two classes;[9] and the same tendency will be found in the rules of law dealing with conveyances. But, seeing that the land law of the Middle Ages falls into these three subdivisions, we must accept them as the basis of our treatment of the forms of conveyance in this period. The first division will be found to be actually and historically by far the most important, both because of the great variety of rights included under it, and because it is the model which the other two divisions tend to follow.

(1) *Freehold interests in lands held by free tenure.*

In dealing with the ordinary forms of conveyance I shall divide them into two classes, (i) those which take effect simply by the act of the parties, and (ii) those which depend for their efficacy upon the machinery of the court. Under the first head

[1] Vol. ii 75 and n. 8; Brissaud, Droit Français ii 1289-1291.
[2] Ibid 1285-1289. [3] Ibid 1291. [4] Ibid 1291-1299.
[5] Ibid 1302-1307. [6] Ibid 1333 seqq.
[7] E.g. the "Appropriances per bannies d'apres la Coutume de Bretagne," dating from the thirteenth century. Three proclamations on successive Sundays barred those in Brittany in eight days, those absent in a year and a day, including, among other things, "la faculté de retrait au profit des parents ou du seigneur," Brissaud ii 1295-1297.
[8] Above 75, 80. [9] Above 212-213, 217.

will fall such conveyances as feoffments with livery of seisin, releases, surrenders, various deeds of grant, exchanges, partitions, and confirmations. Under the second head will fall fines and recoveries.

(i) Conveyances which take effect simply by the act of the parties.

The normal and regular mode of creating or transferring a freehold interest in land of free tenure is by a feoffment. "Feoffment is a species of the genus gift."[1] It is a gift of a freehold interest in land accompanied by livery of seisin. The essential part of the feoffment is the livery of seisin made with the intention of giving the whole or some part of the donor's interest. It was long unnecessary to evidence this transaction by any writing, if it was intended to transfer an estate in possession;[2] and, as we have seen, at first writing was equally unnecessary, while something equivalent to livery of seisin was equally necessary, in the case of incorporeal things.[3] Probably in Anglo-Saxon days the use of writing was the exception rather than the rule.[4] After the Norman Conquest the use of writing became more frequent; but the writings were short and meagre. As Madox says, large estates were conveyed in early days by "very minute charters."[5] Under these circumstances it was inevitable that in early days great importance should be attached not only to the livery of seisin, but also to any other ceremonial observances which would evidence the gift. With some of these other observances—the attestation by a court or men of the neighbourhood, the presence of a number of witnesses, preferably officials or important men, some ceremony before the altar of a church—I shall deal later. Here we are concerned with the livery of seisin which, as we have seen, came to be regarded by the common law as the essential prerequisite to the validity of a feoffment. "It seems probable," says Maitland, "that in this respect our law represents or reproduces very ancient German law, that in the remotest age to which we can profitably recur a transfer of rights involved of necessity a transfer of things, that a conveyance without livery of seisin was impossible and inconceivable."[6]

In early days the ceremonies accompanying this livery of seisin took many different forms. The livery of seisin itself was given

[1] P. and M. ii 82, citing Britton i 221.

[2] Bracton, f. 33b; Litt. §§ 214-217; Co. Litt. 48b; Madox, Form. i, ii; writing was not required till the Statute of Frauds, 29 Charles II. c. 3 § 2; cp. Y.BB. 33-35 Ed. I. (R.S.) 50; 2, 3 Ed. II. (S.S.) 168, 169, 170, 171; 3 Ed. II. (S.S.) 157.

[3] Above 97-98. [4] Vol. ii 76-77.

[5] Madox, Form. xxvi. Even in Edward I.'s reign feoffments and settlements were made without charter, Y.B. 20, 21 Ed. I. (R.S.) 32; vol. ii 352-353.

[6] P. and M. ii 84.

normally and regularly by putting the donee into possession of the land, but the fact that it had thus been given was evidenced by handing over a stick, a hasp, a ring, a cross, or a knife, which was sometimes inscribed or curved or broken.[1] In the Ramsey Cartulary we read of a deathbed gift made by means of some hair cut off from the head of the dying man and deposited upon the altar.[2]

In addition to delivering possession the donor must leave or otherwise abjure the land. There can be no livery of seisin unless the land is left vacant.[3] Thus we read in a letter of attorney to deliver seisin that the attorney was directed "to remove and wholly expel all the tenants and other occupants of the land with their belongings."[4] It is for the same reasons and under the influence of the same ideas that we find in certain places a ceremony of abjuration of the land performed by the person who is conveying it.[5] In early days, therefore, it is impossible to exaggerate the importance of livery of seisin as evidence of title; and, in later days, the stress laid upon it by the king's court made it even more important. It is for this reason that we sometimes find in monastic cartularies, even as late as the fourteenth century, narratives setting forth with great minuteness the story of the events which accompanied a gift.[6]

It is not always easy to keep apart such distinct things as the transaction itself and the evidence of that transaction. Thus we find that there was from early times a tendency to confuse the actual livery of seisin with the symbolical observances designed to evidence it. The tendency to this confusion was helped forward by the growing practice of drawing up a written charter to be a perpetual memorial of the transaction. This practice was encouraged by the influence of Roman law. "To the eye of the barbarians the Roman provincials seemed to be conveying land

[1] For these ceremonies see P. and M. ii 84; Brissaud ii 1278-1280; for instances cp. Madox no. 100, and Select Civil Pleas (S.S.) xv.

[2] Ramsey Cart. i 257 (1133-1160), "Missis ad Rameseiam per Walterum filium suum propriis crinibus reddidit [terram] ecclesiæ. . . . Qui Walterus . . . præfatos crines deferens et super altare ponens . . . in ipso loco et tempore eandem terram quietam ex sua parte clamavit."

[3] P. and M. ii 84, 85; cp. the Y.B. cited vol. ii 352-353.

[4] Madox no. 351, "Omnes tenentes et alios occupatores quoscumque eorundem terrarum et tenementorum cum suis pertinenciis, ab eisdem amovendum et penitus expellendum."

[5] Ibid 472, "Ego Radulfus Grassus et ego Susanna abjuravimus prænominatam Domum coram Burgensibus prædicti Burgi;" cp. Eynsham Cart. (O.H.S.) i no. 147, "Predictus Helias et mater ejus Avicia et frater ejus Walterus venerunt in comitatu et ibi foris juraverunt et foris affidaverunt terram predictam."

[6] Ramsey Cart. i 160-166 (1146-1153) an account of the foundation of the abbey of Saltrey; cp. ibid i 186 (1342) an account of "La liveraunce de la seisine de marreys de Waltone;" and i 137, "Quia quæ non scribuntur citius a veritate et a memoria labuntur, testamentum mutuæ vicissitudinis inter Reinaldum abbatem Ramesiensem et Hugonem de Haliwelle, scripto firmare curavimus."

by means of documents;"[1] and the Anglo-Saxon land book may, as we have seen, have operated as a conveyance of land.[2] Thus less stress came to be laid upon the actual livery of seisin, and more stress upon the symbolical ceremonies or the writing designed to evidence this livery. Abroad the symbolical ceremonies or the writing came in some cases to supersede the actual livery of seisin. The written charter or the symbolical *traditio* became the conveyance. But this was, as we might expect, a gradual process.[3] It is possible that the mere making of the land book did not, even in Anglo-Saxon times, suffice to convey the land without the delivery of the writing.[4] In England, as elsewhere, it is probable that there was a combination of ideas new and old. The delivery of the writing was allowed to stand in the place of the delivery of those rings or rods or knives by means of which seisin had formerly been delivered, or its delivery had been evidenced, and English law long retained traces of this phase.[5] To this day a deed takes its effect from its delivery, and, as we shall see, a fine was to the end "levied." This may have recalled the time when the document lying on the ground between the parties was lifted up by one of them.[6]

It is easy to see that when the law has reached this point it is but a short step to take to say that the document conveys the land. It is true that Justinian's Code expressly stated that "traditionibus et usucapionibus dominia rerum non nudis pactis transferuntur;"[7] but it was admitted in the Institutes that "interdum etiam sine traditione nuda voluntas domini sufficit ad rem transferendam;" and the school of the glossators made the most of these exceptional cases. They allowed that the delivery of the document containing words to the effect that there had been a traditio could transfer possession. Azo declared broadly that "traditione instrumentorum acquiritur dominium vel possessio."[8]

[1] P. and M. ii 190.

[2] Vol. ii 77; and cp. Brissaud ii 1284.

[3] Ibid 1281-1284—perhaps the symbolical traditio was at first allowed when the ceremonies were performed before a court of law, and afterwards without the intervention of the court; later the symbolical traditio became the essential part of the transaction.

[4] P. and M. ii 86.

[5] Y.B. 2, 3 Ed. II. (S.S.) 168 *Bereford*, C.J., says, "Under old law it is the practice to enfeoff a man without charter by horn or spur or rod."

[6] Brissaud ii 1284, "La remise de la *carta* devint pour eux le symbole de l'aliénation; ils virent une tradition *per cartam* là où il n'y avait pour les Romains qu'une *traditio cartæ*. La fusion de la pratique romaine et du droit germanique s'opéra si bien qu'on rencontre des formules d'après lesquelles sur la *carta* déposée à terre se placent la motte de terre et le rameau d'arbre; le tout est levé de terre et remis à l'acquéreur;" but it is not quite certain whether the "levying" of a fine refers to the lifting of it from the ground, or to the fact that the fine is levied or transacted between the parties, P. and M. ii 86, 97.

[7] Code 2. 3. 20.

[8] Brissaud ii 1302, 1303, and references there cited.

But in England this step was not taken. Rather there was a reversion to the old ideas which required an actual livery of vacant seisin. This fact is illustrated by a very clear statement in a case which was before the courts in 1537. "A man was seised of a messuage, and of a close adjoining to the messuage, and made a lease of the messuage for term of years or life; and afterwards made a feoffment of the messuage and close, and delivered seisin in the messuage (the termor being at market, and his wife and children being in the house) in the name of all: now it is to be considered whether the house passed or not. And it seems not, inasmuch as the continuance of the wife and children of the lessee saved the right and possession of the lessee."[1] We must, as we have seen,[2] ascribe this rigid rule laid down by the royal courts mainly to the importance of the publicity of an actual livery in a system which worked with the jury. Perhaps also it was partly due to the early date at which Roman law ceased to exercise an appreciable influence on English law,[3] and partly to the incapacity of the primitive mind to conceive of a transfer of things without actual traditio. Its long continuance in the law we must ascribe partly to the fact that it helped to promote publicity of conveyance, and thus to prevent the frauds which secrecy of conveyance renders possible;[4] and partly to the fact that the procedure in the real actions necessitated the presence of a tenant who was seised.[5] As a result of this rule the principle that no freehold can be limited in futuro comes to be perhaps the most fundamental rule for the limitation of estates in English law; and the principle was applied not only to estates in possession,[6] but also to estates in remainder and reversion.[7] With some of the important consequences which in later law flowed from this principle I shall deal in a later volume. Here we need only note that we can see its effects upon the forms employed by the conveyancers. In the later written charters we often get statements not only that the gift has been made, but also of the steps taken to deliver the seisin.[8]

Thus the common law revived and perpetuated a set of legal

[1] Dyer 18b; cp. Bettisworth's Case (1580) 2 Co. Rep. at ff. 31b, 32a.
[2] Above 95.
[3] Vol. ii 287.
[4] Cp. Brissaud ii 1309.
[5] Willion v. Berkley (1561) Plowden at p. 229 *per* Brown, J.; cp. Challis, Real Property (3rd ed.) 100-101.
[6] Throckmerton v. Tracy (1556) Plowden at p. 156; Buckler's Case (1597) 2 Co. Rep. at f. 55a.
[7] Wrotesley v. Adams (1558) Plowden at p. 197.
[8] Madox, Form. no. 100; Ramsey Cart. i 137, 139; and cp. Brissaud ii 1283, "L'entrée en possession est décrite, parfois avec un grand luxe de détails dans les documents du moyen âge jusqu'a une époque récente," with P. and M. ii 89, "One could not be too careful; one could not have too many ceremonies;" cp. Bl. Comm. ii 315, 316, for a modern description, and for the difference between livery in deed and livery in law.

ideas more ancient than feudalism.[1] On the other hand, we have seen that the common law had, at an early date, begun to eliminate the elements of public law contained in feudalism, and that it had begun to regard land-holding by a free tenure as property law simply. Thus it happens that it is only occasionally and in the century following the Conquest that we see anything of forms which illustrate the lord's rights in the land by requiring his participation in a conveyance,[2] such as we see in France all through this period,[3] and such as we see in England in the case of unfree tenure.[4]

The livery of seisin, then, is the essential part of the conveyance. But gradually the use of writing to show the intent with which seisin has been delivered becomes more common; and Bracton pointed out that it was convenient for the purpose of perpetuating testimony.[5] As it becomes more common it becomes possible to indicate precisely the varying kinds of intent with which seisin is delivered; and, if we look at the large powers which landowners have of making what dispositions they please of their property,[6] we shall see that these written charters which evidence the livery of seisin are in practice absolutely necessary, both to show the intent with which seisin was delivered, and to prove that intent in case of litigation.[7] With the history of the forms which they take we begin the history of the art of conveyancing.

We have seen that the Anglo-Saxon land book—the earliest written document which either transferred or evidenced the transfer of land—was of ecclesiastical origin; but that the formulæ of these land books tended to become stereotyped, because, under the later Anglo-Saxon kings, there grew up a secretarial bureau

[1] P. and M. ii 88, 89.

[2] Madox, Form. no. 508—a grant by Henry II. of land which had been surrendered to him for that purpose; cp. Ramsey Cart. i no. 182 for a similar grant in the same reign.

[3] Brissaud ii 1285-1289.

[4] Below 247.

[5] "Et fiunt aliquando donationes in scriptis, sicut in chartis, ad perpetuam memoriam, propter brevem hominum vitam, et ut facilius probari possit donatio," f. 33b; a good account of the manner in which the written charter and the ceremony of livery of seisin was combined is contained in West, Symboleography (ed. 1615) § 251, "the usual manner of delivery of seisin of houses, lands, tenements, is, that the feoffor and feoffee if they be present, or in their absence their procurators or atturnies . . . doe come to the house or place where seisin is to be delivered: And these in the presence of sundry good witnesses openly read or cause to be read, the deed of feoffment . . . or to declare the verie effect thereof before them in English. Which being so done the feoffor or his Atturney must take a clod of earth or a bough or a twig of a tree thereupon growing, or the ring or haspe of the door of the house, and deliver the same with the said deed unto the feoffee or his Atturney saying: I deliver these unto you in the name of possession and seisin of all the lands and tenements contained in this deed, to have and to hold according to the form and effect of the same deed."

[6] Above 102-105.

[7] Y.B. 4 Ed. II. (S.S.) 160, 187.

which corresponded to the Chancery of the Anglo-Norman kings.[1] We have seen, too, that in the Anglo-Saxon period a new form of written document was being developed. This was the royal writ, which was used to give many different kinds of orders. It might, for instance, be used to order that a person should be put into the possession of property, and, as so used, it could obviously be regarded as a form of conveyance.[2] Under the strong Norman and Angevin kings this writ form became the general form for the issue of royal commands. Therefore it developed in many different directions as the business of the state expanded; and it became specialized with the growing specialization of different departments of the central government. It becomes, as we have seen, the parent of charters, letters patent, letters close, and ordinary judicial writs[3]—a fact which is accounted for by "its great adaptability to all purposes."[4] Short business-like forms appealed to the business-like Norman and Angevin kings. They had no use for the pompous and meaningless rhetoric which characterized many of the Anglo-Saxon land books. After the Norman Conquest, therefore, this new style of writ charter superseded the old land book;[5] and the great landowners soon followed the royal example when they wished to deal with their land.[6] But naturally there was a period of transition. The older ecclesiastical precedents were not lost sight of—especially in the case of gifts to religious houses. Side by side with the new documents, drawn up in the style of a writ, we have documents in which the grantor swears to abide by the gift,[7] in which the donor is made to offer some symbol of his gift upon the altar,[8] in which ecclesiastical penalties are threatened against those who attempt anything against it,[9] in which elaborate ancestral curses are invoked against heirs who presume to dispute it.[10]

It is from these two sources that the ordinary deed evidencing a feoffment with livery of seisin springs. In early days these deeds are brief, irregular, and untechnical in form. It is only by degrees that the settlement of the principles of the land law, and the growth of conveyancing as a distinct branch of the work

[1] Vol. ii 77. [2] Ibid.
[3] E.H.R. xxvii 5; vol. ii 77. [4] E.H.R. xxvii 5.
[5] For specimens see Madox, Form. nos. 62, 63, 64, 65, 285, 492, 504, 505; Eynsham Cart. (O.H.S.) i no. 27; Vinogradoff, English Society 220, 221, 225.
[6] Madox, Form. nos. 75, 288, 289, 290, 291, 493.
[7] Ibid nos. 293, 295; Eynsham Cart. (O.H.S.) i no. 61, "verbo veritatis interposito;" cp. ibid no. 147, "juraverunt quod nunquam inde clamorem facient;" Rievaulx Cart. (Surt. Soc.) p. 76.
[8] Ramsey Cart. i 133, "Et ipse Andreas dedit in capitulo duas terras Deo et Sancto Benedicto offerens super altare cum cultello suo;" Madox, Form. no. 399.
[9] App. III. (4). [10] Madox, Form. nos. 397, 421.

of the legal profession, produces a settlement both of their various parts and of the wording of their various clauses. When they have attained this form they come to be used for many purposes besides those of creating or transferring an estate in the land. I shall, in the first place, say something of the various parts of the ordinary deed of feoffment, and, in the second place, of the various modes of conveyance which could be either effected or evidenced by such a deed.

In modern times we divide deeds into deeds poll and indentures. The deed poll is a deed to which there is only one party. The indenture is a deed to which two or more persons are parties. The latter's name is due to the old precautions taken against fraud. If several persons were parties to a deed as many copies of it were made as there were parties on one sheet of parchment, and the parchment was then cut into parts in an indented fashion across some word such as "Chirograph." It was thus very difficult to substitute a forged deed for the real one without risk of detection. Such precautions were not considered necessary in the case of a deed to which there was only one party; it therefore had a "polled" or smooth top.[1]

The deed poll of the present day begins with the words "Know all men by these Presents." This form originates in the writ style, which as we have seen was frequently adopted after the Conquest.[2] Deeds were generally addressed to certain persons or to certain classes of persons in very various styles, e.g. we find deeds addressed to a particular sheriff or justice, or to all men French or English, or to all sons of Holy Mother Church.[3] This mode of beginning deeds seems originally to have been common to all. But certainly as early as Edward III.'s reign it was beginning to be dropped in the case of the indenture in favour of the modern form—"This indenture made between A and B."[4]

From the earliest time we find recitals setting forth the occasion of the gift. The Anglo-Saxon books, especially in the case of gifts to religious houses, piously reflect upon the virtue of giving

[1] Litt. §§ 370-372; Bl. Comm. ii 295, 296; Madox, Form. xxviii, xxix—there are instances of indenting in Henry II. and Richard I.'s reigns, "Nevertheless," says Madox, "I do not perceive that indenting of the Chirograph became a general practice before the reign of King Henry the Third."

[2] Above 226; App. III. (6).

[3] Madox, Form xxxii, xxxiii and instances there cited; "In general it seems the forms of compellations were such as suited to the condition of the lords and donours that used them, to the countrey where their estates or the estates of their donees lay, and to the relation there was between them and their officers and vassals."

[4] Ibid no. 561; cp. no. 448—a deed of 1316—which begins, "Hoc scriptum Cyrographatum inter, etc. . . . testatur;" Litt. §§ 371, 372 gives both styles; App. III. (5).

to religious purposes.[1] Gradually these vague recitals give place to more business-like statements setting forth the occasions of and the reasons for the gift.[2] These recitals are followed by the names of the grantor and the grantee, the description of the thing granted, and sometimes the consideration for the grant.[3] In the earlier deeds we find, in addition to the name of the grantor, the consents of his relatives[4] or his lord.[5] The description of the thing granted is often lengthy, when individual acres in the common fields are described at length,[6] or when it is followed by a long list of general words describing rights and privileges annexed to the thing granted.[7] Sometimes the property is simply described by reference to the persons lately occupying it.[8]

Then follow the *habendum* and *tenendum*. In later deeds the *habendum* describes in stereotyped form the estate or estates granted. In earlier deeds, and before the list of possible estates had been finally ascertained, various and different forms were employed.[9] In particular many words were sometimes used when it was desired to give to the donee the fullest powers over the land.[10] With the growing fixity of the estates known to the law, and with the growth of the technical words which define them, this clause necessarily shrinks in size. The *tenendum* was used before the statute of Quia Emptores to indicate the lord of whom the land was to be held,[11] and the tenure by which it was to be held.[12] After the statute it was useful only for the latter of these two purposes. Following on these two clauses was the *reddendum*—i.e. the clause which indicated the services to be rendered to the grantor or the lord of the fee. This clause was necessarily of the most varied character, as the services might be either of the most nominal character, such as the gift of a rose,[13] or necessitate elaborate stipulations for periodi-

[1] See Eynsham Cart. i 19-30 for the foundation charter of Ethelred; as we have seen (vol. ii 69) whatever the gift there is usually a small preamble of a theological character, cp. Madox, Form. no. 283.

[2] See e.g. Madox Form. no. 292. [3] See e.g. ibid no. 342.

[4] Ibid nos. 87-90; Ramsey Cart. i nos. 78, 92; Rievaulx Cart. p. 51; Eynsham Cart. i nos. 64-69; 70-77; 78-83; 109; 105.

[5] Madox, Form. nos. 71, 73, 74, 77, 83, 98, 140; Ramsey Cart. i nos. 78, 92; Eynsham Cart. i nos. 86, 88.

[6] Rievaulx Cart. 207, 208; Eynsham Cart. i nos. 150, 205.

[7] See e.g. Madox, Form. nos. 352, 295, 296; Ramsey Cart. i no. 96; ii no. 460.

[8] Madox, Form. Feoffments in Fee *passim*.

[9] Ibid v for various instances.

[10] For a good instance see Eynsham Cart. i no. 263 (1240-1250), "Habendas et tenendas libere et quiete et honorifice et pacifice in fœdo et hereditate sibi et heredibus suis vel suis assignatis et eorum heredibus vel cuicunque vel quando-cunque dare vendere legare vel assignare voluerint in perpetuum."

[11] Madox, Form. nos. 306 and 335, and many other instances.

[12] Ibid no. 291 (knight service); no. 318 (frankalmoin).

[13] Ibid nos. 245, 247, 233; cp. no. 313, "reddendo quasdem cyrothecas;" no. 305, "unam libram cymini vel duos denarios."

cal duties or payments.[1] The *reddendum* might be followed by conditions or covenants of an equally varied character. It was by means of such conditions that such a feoffment came to be available as a mortgage.[2] In earlier times, when the powers which landowners possessed to impose their will upon the grants which they made were large, we find very various covenants. A very usual covenant in the thirteenth century was a covenant wholly or partially restricting alienation.[3] As we have seen, there is an instance in Henry IV.'s reign in which it was attempted in this way to prevent a donee doing anything to impede the proper descent of an estate tail.[4] But it is, of course, to demises for life or years rather than to feoffments in fee that we must look for the most elaborate of these covenants. We find, for instance, covenants relating to the upkeep of the property and to the mode of cultivation of the land,[5] to compensation for improvements,[6] to the mode in which damage by fire shall be made good,[7] to the doing of services such as suit of court.[8] Sometimes the lessee binds himself to reside upon the property, to do suit of court, and to grind corn for the lessor;[9] sometimes to perform the personal or professional duties in return for which the grant has been made.[10]

Following on these clauses comes the important clause of warranty. We find this clause soon after the Norman Conquest. In early conveyances, in the older writ form, it appears in the form of a prohibition against disturbing the gift.[11] It is only gradually that it assumes the shape of an actual warranty.[12] We may perhaps regard its form as derived—like the form of the deed itself—partly from these prohibitions against disturbing

[1] Eynsham Cart. i no. 409 (1268-1281).

[2] Above 129-130.

[3] Madox, Form. nos. 327, 329, 470; Ramsey Cart. ii nos. 364, 398; Eynsham Cart. i nos. 197, 450.

[4] Above 118-119.

[5] Madox, Form. nos. 225, 226, 235, 236, 244.

[6] Ibid no. 224.

[7] Ibid no. 202.

[8] Ibid no. 223; cp. no. 682.

[9] Ibid no. 212.

[10] Ibid no 243—a lease for nineteen years, in consideration that the lessee acts as the attorney of the lessor in the Exchequer; for this mode of remunerating the legal profession see vol. ii 491; cp. ibid no. 216; Rievaulx Cart. 323, 324.

[11] Madox, Form. nos. 285, 290.

[12] Ibid no. 285, "Et defendo ne aliquis eis injuriam inde faciat, super forisfacturam meam, magis quam faceret si Ego illud manerium in mea dominica manu tenerem"—charter of William II. to Battle Abbey; ibid no. 293, "Hanc autem venditionem feci ego et confirmavi in perpetuum esse tenendam; jurando super textum et altare cum omnibus filiis meis"—charter of the time of Henry II.; ibid. no. 295, "Et hanc predictam terram juravi et fidem meam donavi illi guarantizare contra omnes homines;" and cp. Ramsey Cart. i no. 98, "Et ego eis warantizabo in Deo istam predictam terram contra omnes homines. Quare volo et firmiter precipio, ut locus ille, et terra illa, sint quieti et liberi . . . a me et heredibus meis post me futuris."

the gift, partly from the ecclesiastical censures and curses which threatened the disturbers of gifts made by book.[1]

It is probable, as we have seen, that the rules as to warranty which we meet in Anglo-Saxon times in the case of the sale of movables, were applied by the judges of the king's court to the conveyance of land.[2] Perhaps the gift of the lord to his tenant, certainly the ceremony of homage, impliedly bound the lord to warrant the gift.[3] But notwithstanding this implied warranty these clauses of express warranty came into use both in order to ensure freedom of alienation by guarding against the claims of lords or heirs,[4] and in consequence of the provisions of the statutes De Bigamis and Quia Emptores.[5] The extent of the protection afforded by these clauses of warranty, and the mode in which they were expressed, is at first very varied. As a general rule they are expressed to be against all men;[6] but sometimes they are only expressed to be against a particular claim.[7] In earlier days they are often fortified by the oath of the person warranting,[8] and amplified by a promise to grant lands in exchange if the warrantor is unable to warrant the land given.[9] These two clauses gradually disappear. The oath—perhaps a survival of the old ecclesiastical book—became valueless with the exclusion of the jurisdiction of the ecclesiastical courts in all cases which concerned land. The obligation to give land in exchange if the duty of warranty was not fulfilled came to be implied by the law. We have seen that in the course of the sixteenth and seventeenth centuries the modern covenants for title took the place of these clauses of warranty.[10]

The remaining parts of the deed are concerned with the date and the ceremonies attending its execution. Early charters are often not dated; and for this Coke found a technical reason more ingenious than historical.[11] Those which are dated are dated in a variety of different ways—in earlier days by the Indiction, in

[1] Vol. ii 69.
[2] Ibid 76, 82; above 159.
[3] Above 160; and cp. 6, 7 Ed. II. (S.S.) 119-122.
[4] Above 105-106.
[5] Above 160-161.
[6] Madox, Form. vi, vii.
[7] Ibid no. 389, "Et præterea iidem N et M concesserunt pro se et heredibus ipsius M quod ipsi Warrantizabunt prædicto J et heredibus suis prædicta tenementa . . . contra Georgium Abbatem Westmonasterii et successores suos imperpetuum;" for later cases turning on the interpretation of different clauses of warranty see Executors of Grenelife v. W. (1539) Dyer at f. 42b; Lincoln College's Case (1595) 3 Co. Rep. at f. 63a; Edward Seymor's Case (1613) 10 Co. Rep. at ff. 96b, 97a.
[8] Above 229 n. 12.
[9] Madox, Form. vii.
[10] Above 163.
[11] "The reason thereof was for that the limitation of prescription or time of memory did often in process of time change; and the law was then holden that a deed bearing date before the limited time of prescription was not pleadable; and therefore they made their deeds without date, to the end they might allege them within the time of prescription," Co. Litt. 6a; but as Madox says (Form. xxx), "whether that were the true reason may be justly doubted."

later times by the regnal year, by reference to a church festival, a remarkable event, or by the year of our lord.[1] At the end of this period deeds are always dated either at the beginning or at the end. The other ceremonies attending the execution of a deed in modern times are sealing, the delivery, and the attestation of witnesses. Signature, though usual, is not necessary for validity, unless required by statute.[2] With the significance of the delivery of the deed I have already dealt.[3] The custom of sealing seems to have been introduced into England from Normandy by Edward the Confessor; but for some time after the Conquest the Anglo-Saxon custom of signing with crosses was retained.[4] Gradually the seal supersedes the cross and becomes, as we have seen, essential to the validity of the deed. "If a man had not his own seal in readiness, he would sometimes cause the seal of another to be affixt: or if his own were not well known, or for better security and confirmation, he would sometimes use both his own seal and the seal of some other that was better known than his. Sometimes one seal was sett for two persons. And sometimes the witnesses have sett their seals."[5] The attestation by witnesses was in practice perhaps the most important part of the execution of the deed in early days. We have seen that the law made much use of such pre-appointed witnesses; and that in questions which turned upon the validity of a deed the witnesses would sometimes be joined with the jury.[6] Hence the large number of witnesses which we sometimes find, and the care taken to get as witnesses either persons of the neighbourhood, or officials, or fellow-tenants, and sometimes even the king himself.[7] We can see a survival of the Anglo-Saxon land book in the practice of adding to the number of witnesses the Deity and a larger or smaller number of the saints.[8] "The witnesses' names," says Madox, "were usually inserted in the charter, and made a particular clause or part of it; which clause has been called the *Hiis Testibus*. In that case the clerk or writer of the charter used to write down the witnesses' names, and not the witnesses themselves their own names, as at this day they do upon the back or at the foot of the deed."[9]

Such, then, was the general scheme of the deed which had been developed at the end of this period. It was used to evidence or to effect many different kinds of conveyances, among

[1] Madox, Form. xxx, xxxi; for the Indiction see vol. ii 28.
[2] Bl. Comm. ii 306.
[3] Above 223.
[4] Madox, Form. xxvi-xxviii; vol. ii 29.
[5] Madox, Form. xxviii.
[6] Vol. i 334.
[7] Madox, Form. xxxi and no. 163.
[8] See instances in ibid xxxi, xxxii.
[9] Ibid xxxi.

which we may mention the following varieties:—*The release*[1] was used when the tenant was already in occupation of the land, and his lord desired to convey to him his rights. As Littleton puts it, "It shall be in vain to make an estate by livery of seisin to another, when he hath possession of the same land by the lease of the same man before."[2] In the course of the fifteenth century it was used, in conjunction with a lease and entry thereunder, as an alternative method of conveyance to the feoffment with livery of seisin.[3] In earlier times there was sometimes a ceremony with a rod to symbolize the transaction;[4] sometimes the party swore to abide by the transaction;[5] sometimes it was stated that the deeds were also delivered up;[6] sometimes there is some proceeding either in the king's[7] or in the lord's court.[8] In later times either a deed or a fine became the essential feature. As we have seen, at the end of this period the release filled a large space in the law, because it was possible by its means to convey those adverse rights of owners out of possession to the person in possession which the disorders of the times made so common.[9] We may note, too, that with the increasing definiteness of the various forms of co-ownership, it comes to be regarded as the proper form of conveyance between joint tenants, and a possible form of conveyance between parceners, because they are each seised of the whole property.[10] The later classification of releases, which we find in Blackstone,[11] has been in substance arrived at the end of this period. The converse case to the release is *the surrender*—i.e. "a yielding up of an estate for life or years to him that hath an immediate estate in reversion or remainder, wherein the estate for life or years may drown by mutual agreement between them."[12] Such transactions were often effected by deed. But a deed was not strictly necessary. In England, as we have seen,[13] this form of conveyance was not so important in the conveyance of freehold interests as it was in countries more completely feudalized. A conveyance which is somewhat allied to the release is *the confirmation*.[14] It

[1] P. and M. ii 90, 91; Madox, Form. xix-xxi.

[2] § 460; and cp. Y.BB. 1, 2 Ed. II. (S.S.) 28; 12, 13 Ed. III. (R.S.) 106, *Stoutford, arg.*; see Y.B. 18, 19 Ed. III. (R.S.) 478 for a case in which this conveyance was discussed.

[3] Y.BB. 11 Hy. IV. Mich. pl. 61; 21 Ed. IV. Pasch. pl. 10; for the later law see Sanders, Uses (5th ed.) ii 73-75, and the references there cited.

[4] Madox, Form. xix.

[5] Ibid nos. 671, 674, 688.

[6] Ibid xxi and no. 674.

[7] See e.g. Ramsey Cart. i no. 182.

[8] Madox, Form. nos. 660, 674.

[9] Vol. ii 588.

[10] Y.B. 20 Ed. III. (R.S.) ii 286; Madox, Form. no. 706 (1377).

[11] Bl. Comm. ii 324, 325, he says that a release may operate (1) to enlarge an estate; (2) to pass an estate; (3) to pass a right; (4) by way of extinguishing a right; and (5) by way of entry and feoffment.

[12] Co. Litt. 337b; Bl. Comm. ii 326; cp. Madox, Form. no. 512.

[13] Above 225.

[14] Madox, Form. xix.

was a conveyance which attempted, so far as the conveying party could effect it, to make secure an estate which might otherwise have been voidable. Madox tells us that "the most ancient confirmations made after the Conquest often run like feoffments, with the words *Dedi*, or *Concessi* and *Confirmavi*, and are distinguishable from the feoffments chiefly by some words importing a former feoffment or grant." In early times the uncertainty as to how far the lord or the heir was bound by the ancestor's gift made them an important class of conveyance.[1] In later times they were important for reasons very similar in kind to those which made releases important.[2] The *exchange*[3] is "a mutual grant of equal interests, the one in consideration of the other."[4] The use of the word "exchange" came to be necessary to the validity of the conveyance; but in early days was not necessarily used.[5] No livery of seisin was needed to perfect the conveyance; but we can see that something equivalent was required in the rule that the conveyance was not perfect till both parties had made entry on the land.[6] *Partitions* were generally made by deed. In the case of coparceners, this was not strictly necessary until the passing of the Statute of Frauds, because, in the case of coparceners, the right to partition did not depend upon the agreement of the parties. Any one of them could compel partition.[7] In the case of joint tenants and tenants in common it was necessary because it could only be made by mutual agreement.[8] The ordinary *deed of grant* has come by the end of this period to be the usual mode of conveying incorporeal things;[9] and among things which are counted as incorporeal for the purposes of conveyance are rents, reversions, and seignories.[10] But, as we have seen, the rule that an incorporeal thing lies in grant is of gradual growth; and to the end the grantee did not enjoy his full rights unless he could prove an actual user of his right.[11] In the case of a rent the deed sometimes recites that a payment has been made to the

[1] Above 75, 76.

[2] Litt. §§ 515-550.

[3] For some instances from D.B. see Vinogradoff, English Society 226; for the general rules relating to exchanges, see Co. Litt. 51b.

[4] Bl. Comm. ii 323; for specimens see Madox, Form. no. 272; Eynsham Cart. i no. 179 (1199) by fine; cp. Y.BB. 1, 2 Ed. II. (S.S.) 143; 20 Ed. III. (R.S.) i 58, 60 for some discussion as to its nature.

[5] Madox, Form. nos. 259, 260, 261; as early as 1310 a warranty was implied and the parties relied on this, Y.B. 3, 4 Ed. II. (S.S.) 155; cp. Y.B. 4 Ed. II. (S.S.) 62, and the Eyre of Kent (S.S.) ii 162; in the earlier forms express warranties are usually inserted, see e.g. Madox Form, nos. 263, 264.

[6] Litt. § 62; Bl. Comm. ii 323.

[7] Above 127; Britton ii 72 *n.g.* note from M.S. *N;* Bl. Comm. ii 325.

[8] Above 127; Eden v. Harris (1576) Dyer 350b; see Madox, Form. no. 163, for a form of partition between coparceners.

[9] Above 98-99.

[10] See e.g. Ramsey Cart. ii. no. 465.

[11] Above 98-99, 100-101.

grantee.[1] In the case of seignories and reversions the conveyance is not complete unless the tenant attorns to his new lord—i.e. accepts him as his lord;[2] and sometimes in the grant of a seignory or reversion the various tenants and their services will be accurately named.[3] Such attornment could be oral; but sometimes we see ceremonies, such as the payment of a small sum of money, to evidence the transaction.[4] If the tenant refused to attorn himself the court would attorn him.[5] We shall see that it was one of the advantages of the conveyance by fine that upon it proceedings could easily be taken to attorn the tenant.

I have said that it is not always easy to keep apart such distinct things as the transaction itself and the evidence for that transaction.[6] Though the livery of seisin was the essential part of the feoffment, though in the case of certain of these other conveyances some other similar ceremony, such as actual user of the right, actual entry on the land, or the attornment of the tenant was sometimes necessary; it was inevitable that the deed, which contained the expression of the parties intent, and preserved it as a perpetual memorial of their title, should assume greater and greater importance. That importance was increased in the following period by the rise of Uses, and the consequent development of new and complex forms of conveyance, by means of which the land could be conveyed without the need for livery of seisin. Written documents came to be capable of conveying property. Under these circumstances it is not surprising to find that the ceremonies analogous to livery of seisin,[7] and ultimately even the need for livery of seisin itself, should be abolished by the legislature. From this point of view the enactment that corporeal as well as incorporeal things should lie in grant as well as in livery[8] is the logical result of a long historical development.

(ii) Conveyances which depend for their efficacy upon the machinery of the court.

In early days the ceremonies attending the conveyance of property, or the execution of the writing which evidenced that

[1] Madox, Form. no. 482, "Et in possessionem dicti annui redditus prædictum Radulphum Comitem per solucionem unius denarii posui;" cp. nos. 477, 491.

[2] P. and M. ii 93.

[3] See e.g. Ramsey Cart. ii nos. 448, 465; Rievaulx Cart. no. 349.

[4] Madox, Form. no. 187 (12 Ed. IV.), "Noveritis eciam, nos præfatam Ducissam attornasse, per solucionem unius denarii, præfatis Priori et Conventui."

[5] P. and M. i 328; ii 93; above 82.

[6] Above 222; cp. Y.B. 14 Ed. III. (R.S.) 214-216, *Parning* argued that, "Where a deed is produced to prove the title, and the title is not good without a deed, as in the case of rent charge and the like, the issue may be taken on the deed, but where gift or feoffment is taken for title, even though a deed be produced to prove the title, issue shall never be taken on the deed."—But the reporter notes that the common opinion is against Parning.

[7] E.g. 5 Anne c. 3 as to the attornment of the tenant; 7 Anne c. 18; above 100.

[8] 8, 9 Victoria c. 106 § 2.

conveyance, were numerous and varied, in order that there might be no dispute at a subsequent period as to the facts. If there was a writing, we have seen that important or official persons, or persons who lived in the neighbourhood of the property, were often secured as witnesses,[1] in order that the authenticity of the writing might be beyond question. It is on similar principles that in Anglo-Saxon times the land books were often executed before some court, or the fact that they had been executed was notified to some court[2]—the Witan in the case of the king, and humbler courts in the case of humbler men. We meet many variations in this practice after the Norman Conquest. Conveyances of all kinds were acknowledged or executed before the king's court, in addition sometimes to other ceremonies. In 1178 Helewisa, the daughter of Roger de Cily, and the wife of William Cheinedut, made a release to the Abbey of Eynsham. She and her husband swore to abide by the arrangement before the high altar at Eynsham, and then acknowledged the gift at the Exchequer at Westminster before the king's justices.[3] Ceremonies like homage were similarly witnessed;[4] and we may perhaps regard some of the documents drawn up in the style of the writ as emanating from the curia regis.[5] As in the preceding period, conveyances continued to be acknowledged, or compromises made, before the courts of boroughs and other local courts.[6] After the Conquest the practice of enrolment, which was adopted by the king's court, provided another security. There are many instances in which persons paid sums of money in order that their dealings might be entered on the Pipe Roll;[7] and when in later times we get other series of rolls, such as the Patent[8] or Close rolls,[9] we find that a similar use is made of them.

But in all these cases the part played by the court is merely passive. We get the same advantages of authenticity, the same guarantee against forgery, and, in addition, another still greater

[1] Above 231. [2] Vol. ii 76-77.

[3] Eynsham Cart. i no. 168; for other instances see Madox, Form. xi-xiii; Y.BB. 21, 22 Ed. I. (R.S.) 146; 13, 14 Ed. III. (R.S.) 14.

[4] Madox, Form. no. 291, "Ego autem homagium suum accepi coram hiis baronibus de Scaccario" [then follows a list of names].

[5] Above 226.

[6] Madox, Form. nos. 144—an agreement made in the court of the abbot of Ramsey before the abbot and the sheriffs of Cambridge and Huntingdon; 328—sesin delivered coram probis hominibus of the town of Southampton; 674—surrender of charter in lord's court; 677—a release before the court of the borough of Newcastle (1233); cp. a curious tale in Rievaulx Cart. 111-113, of a dispute settled in the lord's courts; for the borough courts and the part which they took see Borough Customs (S.S.) ii cxvi, cxvii; Eynsham Cart. i no. 147 (1171)—a quit claim in the county court of Cambridgeshire; Ramsey Cart. ii no. 453—a confirmation before an ecclesiastical court; Dugdale, Orig. Jurid. 93; for analogies in Germanic law see Schulte, Histoire du droit de l'Allemagne (Tr. Fournier) 457-458, 460-463.

[7] Madox, Form. nos. 140, 141, 142, 320, 325; Ramsey Cart. i no. 200.

[8] Rievaulx Cart. 423, 424. [9] Ibid 423.

advantage if the court actually orders the successful party in a suit to be put into possession. It was an old rule, and one common to many Germanic nations, that possession by order of a court gave to the possessor an undisputed title as against all the world after the lapse of a short period—generally a year and a day.[1] It is for this reason that landowners desired the active intervention of the court. When, in Henry II.'s reign, the royal court succeeded in securing all, or almost all, the important litigation concerning land held by free tenure, it is not surprising to find that its processes were made use of to effect conveyances. We begin to see the fines and recoveries of later law. Landowners not only secured the benefit of possession by order of the court, but also the benefit of the preservation of their conveyances in the king's Treasury. As we have seen, a special set of records —the Feet of Fines—are almost coeval with the court itself.[2] Gradually the mode in which the fine is levied and the legal consequences of levying it become fixed; and the royal processes, here as elsewhere, were imitated by such of the local courts as still retained jurisdiction over real actions.[3] Here I shall deal in the first place with fines levied in the king's court, and in the second place with recoveries suffered before the same tribunal.

Fines.[4]

A fine or, to give it its full title, a "Finalis Concordia," is an action compromised in court, and by the leave of the court, upon certain terms approved by the court.[5] One of the parties to the fine must be seised of an estate of freehold in the land, either rightly or wrongfully—"otherwise it might be in the power of any two strangers to deprive a third person of his estate by levying a fine of it."[6] The essential parts of the fine were fixed during this period, and were as follows: (1) The original writ upon which a "primer fine" was payable to the king. In later days it was usually a writ of covenant. In earlier days many different kinds of writ were used.[7] Sometimes the parties used a writ of right

[1] Borough Customs (S.S.) ii cxv-cxvii; P. and M. ii 95; cp. Brissaud 1292-1301, and Schulte, op. cit. 464-465 for French and German analogies. On the whole subject see Maitland, Coll. Papers ii 61-80; above 70 n. 1.

[2] Vol. ii 184. For later measures taken to further guard against the risks of forgery see 5 Henry IV. c. 14; and cp. R.P. 4 Hy. IV. no 35, 5 Hy. IV. no. 28.

[3] Madox, Form. nos. 154, 379, 394.

[4] App. III. (7); P. and M. ii 96-105; Madox, Form. xiii-xviii; Coke, Reading on Fines (1592).

[5] "Finalis Concordia eo quod Finem imponit negotio, adeo ut neutra pars litigantium ab eo de cætero poterit recedere," Glanvil viii 3; to the same effect Bracton f. 435b.

[6] Cruise, Fines 105.

[7] Madox, Form. nos. 361, 363, 365, 366, 474; Tey's Case (1592) 5 Rep. 39, cited P. and M. ii 98 n. 1.

and went as far as the battle or the grand assize.[1] It was because the process was more simple in personal actions that the writs beginning a real action went out of use.[2] It would seem that if a fine had been levied without original writ it would, though irregular, have been valid, but reversible by means of a writ of error.[3] But all the property which was to be dealt with by the fine must be mentioned in the writ, or must be appurtenant to that which was mentioned in the writ; though the exact extent of this rule was perhaps doubtful, and was not very strictly observed in early law.[4] In some of the earlier precedents it is difficult to distinguish a fine in the strict sense and a composition dealing with many matters settled by the leave and with the sanction of the court;[5] and these earlier precedents naturally puzzled the lawyers when the fine and the procedure upon it became the subject of a mass of technical rules.[6] (2) The "Licentia concordandi," or leave to compromise the suit upon which the "king's silver" or "post fine" is payable.[7] (3) The "concord," or the terms upon which the parties agree. "It is usually an acknowledgment from the deforciants, or those who keep the other out of possession, that the lands in question are the right of the demandant; and from this acknowledgment or recognition of right thus made, the party who levies the fine is called the cognizor or conusor, and the person to whom it is levied the cognizee or conusee."[8] These, Blackstone tells us,[9] are the essential parts of the fine. The two remaining parts are designed to preserve the evidence for the existence and the terms of the fine. (4) The "note." This is an abstract of the writ of covenant and the concord, containing the parties, the parcels of land, and the agreement. A statute of Henry IV. provided for the due enrolment of these "notes."[10] (5) The "foot" or "pes." This contains the whole

[1] Madox, Form. no. 305 (9 Rich. I.); Eynsham Cart. no. 173 (1179); Hunter, Fines ii 97 (10 John).

[2] P. and M. ii 98 n. 1.

[3] Y.B. 21 Ed. IV. Mich. pl. 31 (p. 62) *per* Brian, "Jeo die que en ancien temps fines purront estre levies sans original, et si tiel fin a cest jour soit leve devant nous serra bon tanque soit reverse per breve d'error;" Coke, Reading, Lecture 10.

[4] Ibid, Lecture 11; he admits that in earlier times the rule was not strictly observed; cp. Y.B. 16 Ed. III. (R.S.) ii 332, from which it would appear that the stricter rule was emerging in the case of the married woman, "because the court can only examine her about the matters comprised in the writ."

[5] Madox, Form. xviii; vol. ii 266; and below 239 n. 1.

[6] As it was said in Y.B. 21 Ed. IV. Mich. pl. 32, "En ancien temps les Justices voillent accepter fine quel a cest jour serra void . . . et le cause fuit que ceux que fueront Judges a cel temps, ne fueront connus de la ley, mes ore quant homes ont studies le perfeccion de la ley devomus entendre lour acts auxi pres lour entents come nous poiomus per reason."

[7] Cruise 17.

[8] Ibid 25.

[9] Bl. Comm. ii 351.

[10] 5 Henry IV. c. 14.

transaction—the subject matter of the agreement, the parties, day, year, place, and the persons before whom it was levied.[1] Copies were made at the chirographer's office, and delivered to the conusor and the conusee, and another copy was retained by the chirographer.[2] It is this copy which was the chief record of the transaction.[3] It seems to have been called the "pes" because originally the three copies of the fine, which, since July 15, 1195, had been the form which the record of the fine had been required to take,[4] were written on one parchment; the conusor's and the conusee's parts were written side by side at the top; and below them, separated by an indented line cut across the word "chirograph," was the chirographer's copy, which was preserved in the Treasury. The Pedes Finium were therefore literally what they were called—the feet of fines.[5]

Gradually, as fines became more common, the lawyers began to distinguish between the kinds of fine according to the different transactions effected by them.[6]

The two leading types of fine are the fine *sur cognizance de droit come ceo que il ad de son done*, and the fine *sur cognizance de droit tantum*. The first is what is called an executed fine, i.e. as between parties and privies[7] it operates as a livery of seisin in law. In other words, the conusee may enter without a writ to the sheriff of habere facias seisinam. It is called in 1344 "the strongest possible fine."[8] The second is an executory fine. A writ to the sheriff to give seisin to the conusee is needed for its completion.[9] By it the conusor simply recognizes the right of the conusee. In later law it was chiefly used to pass reversionary interests.[10] Another variety of this kind of fine was the fine *sur concessit*, according to which the conusor, to end a dispute or for some other reason, grants a new estate to the conusee.[11] Both these varieties of this kind of fine acknowledged or created a right in the conusee. In neither case was this right based upon a precedent gift. They do not appear to be clearly distinguished when Coke wrote.

[1] Bl. Comm. ii 351.

[2] Madox, Form. xiv, xvi, the parties originally drew their chirograph and got the sanction of the court to it: when the new practice of drawing it up in triplicate by the officer of the court came in (vol. ii 184), it took the form of a chirograph and the officer who drew it was called the chirographer.

[3] Cruise 34.

[4] Vol. ii 184.

[5] See diagram in Scargill-Bird's index 121.

[6] Bl. Comm. ii 352, 353; Coke, Reading, Lectures 2-8.

[7] "Privies to a fine are such as are anyway related to the parties who levy the fine, and claim under them by any right of blood, or other right of representation. Such as are the heirs general of the cognizor . . . the vendee . . . and all others who must make title by the person who levied the fine," Bl. Comm. ii 355.

[8] Y.B. 18, 19 Ed. III. (R.S.) 82.

[9] Coke, Reading, Lectures 2 and 6; and cp. Y.B. 13, 14 Ed. III. (R.S.) 94 for an early statement of the distinction.

[10] Bl. Comm. ii 353.

[11] Ibid.

The first class of fines (the executed fine) may perhaps be later in date,[1] and designed to obviate the necessity for delivery of seisin by the sheriff. Just as livery of seisin is out of place where the feoffee is already in possession, so a writ to the sheriff to confer seisin would be out of place where the conusee is already seised. In the case of this kind of fine it appears that he is already seised, for the conusor acknowledges that the property belongs to the conusee by virtue of his (the conusor's) gift.[2] But by this kind of fine only an absolute estate of inheritance or of freehold could pass. It could not be used to effect such things as compromises or family settlements.[3] With this object the fine *sur done grant et render* was devised, which was a combination of the two chief varieties of fine. The acknowledgment of a precedent gift by conusor to conusee afforded a foundation for the gift by the conusee of other estates. In this way the fine could be used to effect more complicated limitations than were possible under the form "*come ceo*," and at the same time there was preserved what was the valuable quality of this form—the capacity to pass as between parties and privies the seisin in law without the need of suing out writs to the sheriff. Thus, for instance, A (conusor) acknowledges that the property belongs to B (conusee) and his heirs as that which B had of A's gift; and B grants the estate to A for life with remainders over.[4] Such a re-grant by B could not be founded upon a fine of the second or third class, because in such a case B has nothing in the lands till the fine has been executed, and a man cannot grant what he has not got.[5]

Such, then, was the conveyance by fine as it had been evolved during this period. From the earliest period in the history of the common law it had been regarded as the most sacred and certain of all assurances. It takes an important place in Glanvil's treatise;[6] and by the time of Bracton it has already become the centre of much learning. The mode in which it could be levied

[1] Cruise 64; and cp. the earlier fines in Madox, Form., and those in Hunter, Fines (Rec. Comm.); some of the latter, e.g. ii 65, are really only compositions.

[2] Y.B. 11, 12 Ed. III. (R.S.) 536, "Even if John whom we suppose to have rendered had nothing, still the fine may be effective; for if Robert who acknowledged was seised at the time when the fine was levied, by his acknowledgment the fee simple vested in John's person, and by John's render the estate of Robert, which was only a freehold, and the estate among them and their blood was affirmed such for ever as was supposed by the fine;" cp. 2, 3 Ed. II. (S.S.) 156.

[3] Bl. Comm. ii 353.

[4] Madox, Form. nos. 372 (7 Ed. I.), 375 (1 Ed. II.), 377 (7 Ed. III.).

[5] Coke, Reading, Lecture 6, "Cest fin sur grant et render ne poet estre levie sur un fin executorie: et pur ceo, si home levie un fine sur conusans de droit tantum al J.S. il ne poet graunte et render les terres arrere al conusor, pur ceo, que le conusee n'ad riens en les terres, tanque execution sue, et home ne poet graunt ceo, que il n'ad;" cp. Y.BB. 2, 3 Ed. II. (S.S.) 156; 18, 19 Ed. III. (R.S.) 108-112.

[6] Glanvil, Bk. viii.

was in the thirteenth century the subject of a short tract, which is printed among the statutes of uncertain date;[1] and in the fourteenth century there is at least one other unpublished tract relating to the same subject.[2] The effects of a fine had engaged, as we shall see, the attention of the legislature; and it had been said in Parliament, in Thomas Weyland's case[3] (1291), that "in this realm there is neither provided nor devised a greater or more solemn assurance, nor one through which a man may have a more secure estate, nor can he produce more solemn testimony to prove the existence of that estate, than a fine levied in the court of our lord the king."[4] All through this period it was regarded with the same reverence. To Coke it was "one of the highest matters of record, first instituted for the quiet establishing and sure settling of men's inheritances."[5] If we look at some of the effects of the fine we shall understand the reasons for the reverence with which it was regarded.

(1) In early law the fine "sets a short preclusive term running against the whole world, parties, privies, and strangers."[6] The only exceptions are persons under some such specific disabilities as minority, imprisonment, insanity or absence beyond the seas.[7] As we have seen, one of the parties must be seised of the land; but even if neither were seised it was enacted in 1299 that the fine, provided it were duly levied, though it had no effect on the rights of strangers, should bind parties and privies.[8] The length of this term was ultimately fixed at a year and a day.[9] Unless within

[1] Modus Levandi Fines, Statutes (R.C.) i 214; it is often printed as a statute of 18 Edward I.

[2] P. and M. ii 98 n. 1.

[3] R.P. i 67 (19 Ed. I. no. 1).

[4] Cp. the Modus Levandi, which speaks of the "haute bare," "graunt force," and "puissaunt nature" of the fine.

[5] Coke, Reading, Lecture 1; to the same effect is the argument in Stowel v. Lord Zouch (1563) Plowden at p. 357.

[6] P. and M. ii 100.

[7] Modus Levandi, "A fine . . . concludeth not only such as be parties and privies thereto, and their heirs, but all other people of the world being of full age, out of prison, of good memory, and within the four seas the day of the fine levied, if they make not their claim by their action on the foot of the fine within a year and a day;" cp. Eynsham Cart. i p. 7 (1220) for a fine disputed on the ground of absence.

[8] P. and M. ii 101 n. 1; 27 Edward I. st. 1 c. 1—the statute had a retrospective operation; its interpretation is discussed at some length in Y.B. 13, 14 Ed. III. (R.S.) 36, 86-96; at p. 36 *Scrope* says, "It would be right that the fine should be avoided by averment when he who rendered had nothing, and in all other cases where the fines are good only as between parties who are ousted of the averment by statute;" at p. 90 *Aldeburgh* says, "The subject of this statute is that of fines duly levied, and its purport is that neither those who are parties to the fines nor their heirs shall be admitted to avoid them . . . still, the object of his averment is not to avoid the fine, but it is to prove by the deed which he alleges that the fine was never in force against him and so to prove that it has not been duly levied; wherefore . . . he shall have the averment;" cp. as to this point Y.B. 33-35 Ed. I. (R.S.) 435-439.

[9] P. and M. ii 101—it was not settled in Bracton's time, but it was in the reign of Edward I., as appears from the Modus Levandi, and Fleta 6. 53; cp. Plowden at pp. 357, 358.

that term action had been brought, claim entered, or entry made, all adverse rights disappeared.[1] It is probable that this term began to run, not from the time when the action was compromised, but from the time when the sheriff had delivered seisin in pursuance of the fine. "Seisin under the order of the king's court, seisin under the king's ban, it is this rather than the mere compromise of an action that, if we look far enough back, seems the cause of preclusion."[2] Therefore, it would be a good plea to a fine to say that the party levying it and his heirs had been seised at the time of the fine and ever since. The statute of 1299, asserting that this was contrary to old law, took away this plea from the parties and privies.[3] The result was that the short preclusive term began to run as against the parties and privies from the levying of the fine—in other words, the fine, and not the livery of seisin given in pursuance of the fine, as between the parties and privies, became the conveyance.

We have seen already that the legislation of Edward I.'s reign was tending to obscure the meaning of the term "seisin"—to give it some connotation of property.[4] Probably this legislation with regard to fines assisted the process. It allowed this seisin to be transferred, as between parties and privies, by a ceremony before a court; and this must, in the long run, have tended to make a transfer of seisin look a little less like the simple delivery of possession which is transferred by a physical traditio. It certainly tended to obscure the fact that it was seisin given by order of the court, and not the mere levying of the fine which originally gave to a fine its peculiar effects as against all the world; and at the same time other causes were operating in the same direction. (i) We have seen that if the conusee was already seised a writ to the sheriff to give him seisin was not necessary; and that the fine "*come ceo*" probably gained its popularity because, the fact of the conusee's

[1] P. and M. ii 101, 102; Coke, Second Instit. 518. Maitland (P. and M. ii 102) tells us that it is a common thing on old fines to see claims entered; at the back of the "pes" we read, "A apponit clameum suum;" see Plowden at p. 358.

[2] P. and M. ii 101; and it is quite clear that the mere judgment of the court will not do—there must be a physical transfer of seisin, see Y.BB. 20, 21 Ed. I. (R.S.) 52 *per* Berewicke; 33-35 Ed. I. (R.S.) 200, *per* Herle, *arg.*; 1, 2 Ed. II. (S.S.) 47, "Freehold never passes till seisin is delivered by the king's officer with the court's warrant;" Stowel v. Lord Zouch (1563) Plowden at p. 357. It is the fact that the fine owes its effect to seisin delivered by a royal official, which renders it doubtful whether there is any relation between it and the in jure cessio of Roman law; Bracton, no doubt (f. 310a, b) defines it in terms applying to the in jure cessio; but we cannot lay any great stress on his use of the phraseology of Roman law, vol. ii 284-285.

[3] 27 Edward I. st. 1 c. 1; as Maitland points out (P. and M. ii 105 n. 1), to allow such a plea to a party may well have been an innovation; but it is probable that it had always been allowed to the heir; he shows that it is sanctioned by Bracton and by cases in the Note Book; cp. Y.B. 17, 18 Ed. III. (R.S.) 178 *per* Shardelowe, J., for a good statement of the evil which the statute was designed to remedy.

[4] Vol. ii 354.

being seised being obvious on the face of the fine, seisin by order of the court could be dispensed with. Such a fine conferred a seisin in law as against the conusor and those in privity with him.[1] If it was desired to make any further limitations recourse could, as we have seen, be had to the fine "*sur done grant et render.*" (ii) When it came to be recognized that incorporeal things lay in grant, the levying of any kind of fine of an incorporeal thing had the effect of a grant, and vested that thing in the conusee.[2]

In all these cases, therefore, the levying of the fine rather than the actual conferring of seisin by the court came to be the important matter. It is true that the seisin so obtained, whether under the statute of 1299 or under the fine "*come ceo*," bound only the parties and privies. It would therefore be open to a stranger to show that the facts alleged by the fine were otherwise;[3] or that the conusee had never been seised;[4] or that the fine had not been duly levied so as to bring it within the protection of the statute of 1299.[5] But the case of *the Stantons* shows that the court regarded the last-mentioned plea with suspicion and admitted it with difficulty.[6] As Coke, referring to this case, well puts it,[7] "The judges themselves were sometimes so fearful to weaken the strength and force of fines, and sometimes so bedazzled with the bright solemnity of the fine, as Sir John Stoner, Chief Justice of the Court of Common Pleas, did see, that an averment ought to be had against a fine, both by Conscience and the Law of God; and yet, lest the fine should be avoided, he would be advised."[8] Unless it could be shown that neither of the parties to the fine

[1] For the advantages of an executed fine see Y.B. 2, 3 Ed. II. (S.S.) 156 *per* Brabazon, C.J.; Coke, Reading, Lecture 2, says of an executed fine "*come ceo*," that it is so called, not because the conusee is in possession, but because, being executed as between the parties, he is deemed as against them to be in possession; but as against strangers the conusor is in possession till entry made, see next note; the principle is clearly stated Y.B. 17, 18 Ed. III. (R.S.) 200 by *R. Thorpe, arg.*, that the effect of a fine "*come ceo*" is to vest the freehold as against the conusor in the conusee.

[2] Coke, Reading, Lecture 2, "C'est fin est execute, pur ceo que suppose un done precedent, mes coment que ceo soit execute enter les parties, uncore quant a touts estrangers le conusor demurt seise del terre: mes si tiel fine soit levie d'un Rent, Common, Advowson, Liberties, ou tiels semblables, le conusee ad un frank tenement en Ley en luy, devant ascun possession, ou actual seisin ewe;" cp. Shelley's Case (1581) 1 Co. Rep. at p. 97a.

[3] Eyre of Kent (S.S.) ii 170; Y.B. 12 Rich. II. 138-139.

[4] See Y.B. 6 Ed. II. (S.S.) i 116-117.

[5] Y.B. 13, 14 Ed. III. (R.S.) 90; above 240.

[6] Ibid 16-36; cp. 3, 4 Ed. II. (S.S.) 52-56.

[7] Second Institt. 523.

[8] The views of *Stonore*, C.J., are taken from another case of the same year, Y.B. 13, 14 Ed. III. (R.S.) 96, "We see, on the one hand, that according to good conscience and the law of God it would be contrary to what is right, if the plaintiff speaks the truth, that by such a fine, which is void, he should be disinherited; and, on the other hand, it is a strong measure, having regard to the law of the land, to take an averment which may annul the fine; wherefore we wish well to consider it."

had anything in the land on the day when the fine was levied, it was in practice difficult for strangers to stop the running of the short period of a year and a day which would bar their rights for ever. In 1338 Trewitt, with the assent of the court, maintained that it was only if a third person could show that neither party had anything in the land at the time of the fine levied that he could avoid the fine; and in order to do this he must, as Sharshulle, J., pointed out, show who was seised.[1] It might well happen that the interested persons never heard of the fine till it was too late. Nor were matters mended if these strangers were, as it was very likely they would be, persons entitled in remainder or reversion. Coke[2] tells us that such entry as would stop the running of the period of limitation must be made by the person who had a present right; "and therefore if there were tenant for life or in tail, the reversion or remainder over in fee, he that had right of reversion or remainder expectant upon an estate for life or in tail could make no claim, because he had neither present right of action nor of entry; and therefore in that case the tenant for life or in tail must make his claim; and that claim either by action or entry upon the foot of the fine, or by lawful entry or by continual claim, should not only have preserved their own right, but also the right of them in reversion or remainder; but if no claim were made by the particular tenant, the right of them in remainder or reversion were for ever bound by the common law."[3]

Against such law we are not surprised to find parliamentary petitions.[4] In answer to one of these petitions the Statute of Non-claim was enacted in 1360,[5] by which it was provided that a fine should not affect the rights of strangers. But this went too far in the other direction. No man could be sure of his possessions; and if we consider the extent to which the technicality of the law favoured the manœuvres of the powerful and

[1] Y.B. 12, 13 Ed. III. (R.S.) 536; cp. 17, 18 Ed. III. (R.S.) 178, 184 *per* Grene, *arg.*; S.C. at p. 184 *Sharshulle*, J., says, "I understand the statute to mean (and so I have heard the sages of the law say) that neither parties nor heirs of parties shall have any averment contrary to the fine in order to avoid it, nor a stranger any more, except on special matter. . . . The special matter which would give him the averment would be on the ground that himself, or some other person, whose estate he has, was seised; therefore that affirmative, that is to say the seisin of another person, would be a more natural issue than the negative on the non-seisin of the parties;" cp. p. 202 for another version of the same statement; for a case in which a stranger tried to delay the levying of a fine on the ground that the parties had nothing in the land see Y.B. 6 Ed. II. (S.S.) 195.

[2] Second Instit. 518; to the same effect Stowel v. Lord Zouch (1563) Plowden at p. 359.

[3] These doctrines will make it plain that by levying a fine it was very easy to defeat the claims of donors and heirs to conditional fees (above 113-114), and will show that the clause in De Donis (above 117) to the effect that a fine should not affect their rights was absolutely necessary to secure the due working of the statute.

[4] R.P. ii 142 (17 Ed. III. no. 26). [5] 34 Edward III. c. 16.

the litigious,[1] if we consider the encouragement which this state of the law gave to disorders which culminated in the Wars of the Roses, we are not surprised to find that in Richard III.'s and Henry VII.'s reigns this statute was repealed and the law modified. "When we remember," says Maitland,[2] "how easily seisin begets proprietary rights, how at one and the same moment half a dozen possessory titles to the same piece of land—titles which are more or less valid—may be in existence, we shall not be surprised at the reverential tones in which the fine is spoken of; it is a piece of firm ground in the midst of shifting quicksands." It was clearly a piece of good statesmanship to restore this piece of firm ground.

Henry VII.'s statute[3] to some extent restored to the fine its old preclusive effect. The court of Common Pleas again became "market overt for the assurances of land by fine."[4] But the statute lengthened the period which must elapse before this effect was obtained to five years; and it avoided some of the defects of the old law by requiring the fine to be levied with proclamations, and by allowing those in reversion and remainder, as well as those under certain specified disabilities, a period of five years after their estates vested in possession, or their disability terminated, to make their claims. Thus the older law was restored with modifications. The difference between executed and executory fines still remained; and it was made a principal division by Coke in his Reading on Fines. It serves to remind us of the time when it was not the levying of the fine, but the livery of seisin by the sheriff which made the conveyance. With the rise of uses all the older questions as to the passing of the seisin rapidly became obsolete. When a fine "*come ceo*" was levied to certain uses the seisin was transmuted, and the statute operated to annex to the uses declared upon that seisin the legal estate.[5]

With the effect of the fine in barring an estate tail I have already dealt.[6]

[1] Vol. ii 415-416, 457-459. [2] P. and M. ii 102.

[3] 4 Henry VII. c. 24, re-enacting and improving 1 Richard III. c. 7.

[4] Fermor's Case (1602) 3 Co. Rep. 78b; cp. Coke, Reading, Lecture 1, "As the common law hath prescribed a sure and safe way to require and get the property of goods, by sale in market overt; so also the common law hath ordained a sure manner of conveyance for the purchaser of lands;" "if it is a mere legal title, and a man has purchased an estate which he sees himself has a defect upon the face of the deeds, yet the fine will be a bar; . . . for the defect upon the face of the deeds is often the occasion of the fine's being levied," Story v. Lord Windsor (1743) 2 Atk. at p. 631 *per* Lord Hardwicke; and see Stowel v. Lord Zouch (1569), Plowden at p. 369; the arguments in this case contain a very elaborate discussion of this Act.

[5] Bl. Comm. ii 363, 364; Sir Moyle Finch's Case (1607), 6 Co. Rep. 68a, 68b.

[6] Above 120.

(2) The fine gave an effectual guarantee against forgery. It is true that attempts to forge fines were not unknown; but there was every chance that the forger would be discovered.[1] We have seen that this security was strengthened by an Act of Henry IV.'s reign.[2]

(3) There was a very speedy process provided by which the conusee could get possession; or, if the fine was of a reversion, by which the tenants could be attorned to the conusee.[3]

(4) From the thirteenth century onwards it was the married woman's conveyance. The judges must examine her to see if she freely consents.[4] If they were satisfied and passed the fine, she could not upset the transaction by a *cui in vita*[5] after her husband's death. The principle seems to be that a fine is so solemn in its nature that, once passed, it stands. "This is so to be understood," says Coke, "that it [the fine] ought not to be received, if she be not examined, and freely assent as is aforesaid; but if the fine be received, and recorded, the feme covert or her heirs shall not be received to aver that she was not examined nor assented: for this should be against the Record of the Court, and tending to the weakening of the general assurances of the Realm."[6] It was not, as in later law, the separate examination, but the sanctity of the fine, which made it the married woman's conveyance.[7] The same principles were applied to a fine levied by an infant or a lunatic, or to an irregular fine which had been in fact levied.[8]

(5) It afforded an easy way of effecting a family settlement by one conveyance; but of this, and of the influence of the fine upon the development of conveyancing, I shall speak later.[9]

[1] P. and M. ii 100; Plac. Abbrev. 182.

[2] Above 237.

[3] P. and M. ii 100, 102.

[4] Modus Levandi; see e.g. Y.B. 19 Ed. III. (R.S.) 38; and Y.B. 3, 4 Ed. II. (S.S.) 151 for a case where, on examination, it appeared that the woman did not consent.

[5] For this writ see above 22.

[6] Second Instit. 515; but the woman was not barred if the fine was on the acknowledgment of the husband alone, Y.B. 20 Ed. III. (R.S.) ii 72-80.

[7] In later law the reason for the efficacy of this conveyance is found rather in the separate examination, see the authorities collected by *Parker*, J., in Johnson v. Clark [1908] 1 Ch. at pp. 313-318. The transition between these two views probably occurred in Edward IV.'s reign; in Y.B. 9 Ed. IV. Trin. pl. 44 Littleton said in argument that, though a married woman could not be estopped by deed, she might be estopped by such matter of record as a fine or a recovery; but in Y.B. 15 Ed. IV. Trin. pl. 6 Littleton and Brian, C.J., agreed that she could not be estopped by fine or recovery unless she had been separately examined.

[8] Cruise 111; Coke, Reading, Lecture 7; Plowden, 34; above 242; Y.B. 12, 13 Ed. III. (R.S.) 276—the judge who had received an infant's fine unconditionally was blamed; apparently the fine was good—but the report is not very clear.

[9] Below 252-254.

Recoveries.

I have already said something of the nature of a recovery.[1] During this period it was never, like the fine, a regular mode of conveyance.[2] It was regarded rather as a collusive proceeding designed to evade the law. That this was its character in early law is quite clear. It had been used to oust termors of their land,[3] to enable husbands to convey their wives' land,[4] to evade their wives' claims to dower,[5] to defeat the laws of mortmain.[6] In all these cases it had been necessary to pass statutes to nullify the effects of a recovery. Finally we have seen it was used in conjunction with the law as to warranty to bar an estate tail.[7] It was only because this coincided with the policy of the law that it was allowed to operate in this case, and thus at length to attain to the dignity of a common assurance.[8] As was the case with the fine, the recovery was not perfect till seisin had been delivered in pursuance of the judgment of the court;[9] but here, too, the rise of uses deprived such questions of almost all their practical importance. Similarly a recovery suffered by a married woman or an infant was good in the same manner and for the same reasons as a fine levied by persons under these disabilities.[10]

(2) *The Copyhold.*

It is during this period that the present mode of copyhold conveyance by way of surrender in court and admittance by the lord or his steward was evolved. The form of this conveyance was one of the earliest results of the practice of keeping court rolls, which, as we have seen, became general in the thirteenth century.[11] It is the form of the conveyance which has given to the copyholder his name, and has supplied in later law the chief test between free and copyhold tenure.[12]

We can see the evolution of this mode of conveyance upon the rolls of manorial courts. Maitland observes that, from the rolls of the Bishop of Ely's court at Littleport, we can see a stage in the growth of this mode of conveyance, and therefore

[1] Above 117, 118-119.

[2] This is well illustrated by the fact that no fine for alienation was payable on a recovery till 32 Henry VIII. c. 1, "for it was no alienation since the recoveror claimed not in by the tenant," Staunford, Prerogative c. 7.

[3] Stat. of Gloucester, 6 Edward I. c. 11.

[4] 13 Edward I. st. 1 c. 3.

[5] Ibid c. 4.

[6] Ibid c. 32.

[7] Above 118-120.

[8] It was said in 1614 (10 Co. Rep. at p. 40) that they were "the sinews of assurances and inheritances and founded upon great reason and authority;" and that a person who dared speak against them was "not worthy to be of the profession of the law."

[9] Cruise, Recoveries 13, 138, 139.

[10] Ibid 143, 146; below 517-518.

[11] Vol. ii 370-371.

[12] Ibid 33; below 268.

in the formation of copyhold tenure. "In the cases from Edward I.'s reign, in which there is litigation about villein tenements, a jury is employed; at a little later date the litigants put themselves not upon a jury, but upon the rolls of the court as giving the proper proof of title.[1] On the Durham Halmote rolls, a tenant is said in 1345 to hold "per rotulos Halmoti."[2] When this mode of conveyance has become firmly established we can see that it is used to effect many different kinds of disposition—settlements,[3] partitions,[4] and, in fact, most of the other arrangements which, in the case of land of free tenure, were effected or evidenced by deed.[5] Similarly we see in the manorial court a proceeding very like a fine.[6]

It is clear that this mode of conveyance emphasized the lord's rights. He was able to charge fines upon admittance[7] and sometimes for enrolment;[8] and therefore from an early date the rule was established that the use of any other mode of conveyance was a cause of forfeiture.[9] The lord must not be defrauded of his dues. Also he was entitled, in early days, to some discretion as to the kind of tenants who proposed to join his manor. As we have seen, the manor was a little community;[10] and the conveyance which conferred the duties and privileges of membership could not be regarded as merely the affair of the transferor and the transferee. Both the lord and the court were interested in knowing something about it.[11]

In later days, when copyhold custom became stereotyped, and enforceable as against the lord;[12] when copyhold tenure came to denote simply property of a peculiar type; the discretionary powers of lord and court disappeared. By the time of Coke the lord had

[1] The Court Baron (S.S.) 112; cp. for instances of the ordinary modes of conveyance, ibid 122, 125, 130, 135, 6; for a case where the terrier is vouched as evidence, ibid 133 (1321); where the rolls are vouched, 134 (1321); where the rolls are ordered to be searched, 147 (1327).

[2] Halmote Rolls (Surt. Soc.) 14.

[3] Select Pleas in Manorial Courts (S.S.) 126, 127 for an elaborate settlement, and, apparently, a testamentary bequest by the chaplain; The Court Baron (S.S.) 135, 136.

[4] Select Pleas, etc. 183.

[5] Durham Halmote Rolls 11, 69 (compositions); most of the instances on the rolls are grants of life interests.

[6] Select Pleas in Manorial Courts 24; cp. The Court Baron 138—a married woman separately examined.

[7] Select Pleas, etc. 11, 23.

[8] Ibid 40, where 10s. is paid to have a settlement enrolled in full court.

[9] Ibid 37, 38; 91 (fine imposed), 171.

[10] Vol. ii 377-378.

[11] Select Pleas in Manorial Courts 127—the entry which deals with the testamentary proceedings of the chaplain tells us that the jury, saying that they knew nothing of the matter, departed in contempt; Maitland suggests that they did so because they did not like these proceedings.

[12] Above 208-209.

become simply "custom's instrument."[1] He is merely an agent to carry out the wishes of the tenant in accordance with the custom.[2] The form of the conveyance tells us of a time when his position was very different—but it is a bare form, out of which the reality has departed.

(3) *The lease for years.*

We have seen that the position of a chattel real assumed by the lease for a term of years was the result of a technical rule which had its origin in an attempt to imitate the Roman law of possession.[3] We have seen, too, that the result of this rule was to deny any kind of real right to the lessee for years and to give him only a personal right as against his landlord; but that this result was found to be so inconvenient in practice that he gradually attained a right as real as that of the freeholder, though, owing to this unfortunate imitation of Roman law, it was protected by personal actions, and was accounted a chattel.[4] The ordinary forms of creating or conveying these interests show more clearly than anything else the extreme technicality of the rule which denied a real right to the lessee for years. There is often very little difference between a lease for life and a lease for years—in fact, some demises seem to be a combination of the two.[5] On the other hand, because demises for years were used for a variety of different purposes,[6] there are great differences in their contents. There is little in common between a demise of a large manor, with all its rights and privileges,[7] and the demise of a small plot of land to a tenant farmer in which the feudal rights of the lord are carefully reserved.[8] It would hardly be going too far to say that the rule which puts estates for years into a category different from that of estates for life has left little trace upon conveyancing in this period. We may perhaps see some trace of it in the forms of warranty employed. Thus, in 1257 we get an elaborate warranty in a lease for forty years to the Abbey

[1] Coke, Copyholder § 41, "In disposing of it (the copyhold) he is bound to observe the custome precisely in every point, and can neither in estate nor tenure bring in any alteration in this respect; the law accounts him custom's instrument."

[2] Being an agent it does not matter whether or no he is under disability to make ordinary conveyances when he admits, Coke, Copyholder, § 34.

[3] Vol. ii 205.

[4] Ibid 261-262, 354-355.

[5] Madox, Form. no. 205, "Ad terminum vitæ suæ et duorum annorum subsequencium post vitam;" cp. Eynsham Cart. i no. 573 (1350), grant for life and one year over.

[6] Above 215.

[7] Madox, Form. nos. 239, 246, 248.

[8] Ibid no. 237, "Salvo tamen eidem Abbati Dominio suo ut in wardis, releviis, escaetis, herietis, sectis curiarum, attachiamentis, cum omnimodis amerciamentis inde provenientibus;" cp. nos. 240, 244 for good specimens of agricultural leases.

of Eynsham;[1] and in a charter of Edward III.'s reign there is a clause in a lease providing that neither the lessor nor any other deriving title through him will eject the lessee within the term.[2] But for the most part the clauses of warranty are similar in form to those contained in any other demise; and in other respects their contents present similar features. There are similar clauses of distress and powers of re-entry.[3] There are the same varied covenants and conditions. The forms employed also go through similar changes. Thus we find in early demises the pledge of faith; we find that in the later demises the parties are content with the ordinary clause of warranty.[4]

Until the time of the passing of the Statute of Frauds writing was not required for a lease for years. But indirectly the parties were practically compelled to make such leases by deed. It was only if the lease was by deed that the lessee could bring covenant against his landlord—his only remedy until the rise of the newer remedies for the protection of his possession;[5] or that lessor or lessee could enforce the mutual covenants which they had entered into. But the mere making of the deed did not suffice to give the lessee any estate in the land. Till entry he had merely an *interesse termini*, a right to enter.[6] It was not till he had entered that he was possessed of his term, so that till then he could take no release,[7] nor was he entitled to use the new remedies for the protection of his possession with which the law had provided him.[8] In this as in other branches of the common law writing by itself did not suffice to transfer possession.

The Modes in which Landowners were able to deal with their Lands by means of these Conveyances.

The brief conveyances of the first two centuries after the Conquest generally effected little else than the actual creation or transfer of some estate in the land. It is not till the latter

[1] Eynsham, Cart. i no. 313, "Ego vero Willelmus vel heredes mei dictum tenementum nulli omnino hominum Judeo vel Christiano infra dictum terminum dabimus vel vendemus, invadiabimus vel legabimus preter dictis dominis meis;" and if anything be done contrary to this undertaking the abbey is to have the land in fee.

[2] Madox, Form. no. 168, "Vult tamen et concedit præfata Alicia quod si nec præfatus Prior nec successores sui, nec aliquis alius per eos, illam ejecerint infra terminum suum;" cp. Y.B. 10 Ed. III. Trin. pl. 33—a lease for twelve years on condition that if the lessee is disturbed he shall have the land in fee.

[3] Madox, Form. cp. nos. 241, 242 (leases for years) with nos. 212, 216 (leases for life).

[4] Ibid nos. 223, 229, 232 for the pledge of faith and mutual oath of the parties.

[5] Above 213.

[6] Litt. § 58; for the position of a person who had an interesse termini see Bk. iv Pt. II. c. 1 § 7.

[7] Bl. Comm. ii 324.

[8] Above 214.

half of the thirteenth century that we get documents the object of which is more ambitious. In that period of the rapid expansion of the common law we get, as we have seen, documents in which an owner purports to effect somewhat elaborate settlements of his property.[1] It is not quite clear that an owner has no power to devise; and we have seen that we still get instances of anomalous gifts which seem to partake of the nature both of the settlement and the devise.[2] Again, it was possible to insert very varied stipulations in a lease for term of years; and by means and as part of such a lease somewhat complicated arrangements were sometimes effected. Thus in 1257[3] William de Submuro leased his tenement to the Abbey of Eynsham for forty years. In return for this lease the abbey redeemed the tenement in question from the Jews, and gave to the lessor and his wife during the term, if they should so long live, three quarters of corn and one quarter of barley a year. If the lessor died before his wife she was to have either her dower of a third or the annual corn and barley, as she might choose. If the lessor was taken into the service of the monastery only half the corn and barley was to be payable "ad opus uxoris meæ;" moreover, the lessees were to acquit the lessor of the three shillings rent charge which he owed his mother as her dower, and of two pence rent which he owed the prior.

We have seen that the growing fixity in the principles of the law tended to set some bounds to the freedom with which individual owners of property could make their own law for their estates.[4] Hence conveyances tended to become more fixed in their form; and it became less possible to effect directly by a single conveyance a complicated settlement of property. Settlors therefore made elaborate covenants binding themselves to carry out a particular scheme; and afterwards carried out that scheme by drawing up the several different kinds of conveyances which were necessary to give effect to it. Later, as the ingenuity of the conveyancer developed the art of conveyancing, it became in some cases possible to effect by a single instrument an intention which in earlier days several instruments were needed to effect. I have already noted one instance of this process in the development of the forms used to effect a mortgage.[5] It is still more noticeable in the forms used to effect a family settlement. A very common manner of effecting such a settlement in this period was by making use of the feoffment and refeoffment.[6] X being

[1] Above 104.
[2] Above 222; cp. Eynsham Cart. i no. 132 (1172-1190), a gift "in articulo mortis."
[3] Ibid no. 313.
[4] Above 105.
[5] Above 130 n. 3.
[6] P. and M. ii 91, 92.

seised in fee simple enfeoffs A, B, and C that they may convey to him a life estate or an estate tail with the appropriate remainders. In Edward I.'s reign there is an instance in which the parties seem to contemplate at least four assurances in order to effect this object. There was first the feoffment, secondly a covenant to make the refeoffment, thirdly the refeoffment itself, and fourthly a fine to be levied to secure the whole transaction.[1] Towards the end of this period the same result was secured by two deeds. The feoffor enfeoffed several persons on condition that they made the feoffment required.[2] These later deeds illustrate the point which has already been noted, that common law conditions were capable of being so used that they could effect some of the objects of the use; but they show us also one point in which the machinery of the use possessed a decisive superiority. At least two deeds were needed to give effect to the conveyance by way of conditional feoffment: the whole transaction could be effected by one conveyance by means of the machinery of the use.[3] If anything more elaborate was required than a conveyance to the feoffor with limitations over considerably more than two conveyances were needed. There is a very good instance of this in one of the forms in Madox's collection.[4] In March, 1348, Ralph Lord Stafford agreed with John L'Estrange of Whitchurch that Fulk, the son of John, should marry Elizabeth, the daughter of Lord Stafford. John was to enfeoff Fulk and Elizabeth and the heirs of their bodies with land to the value of 200 marks in the counties of Shropshire and Cheshire, reversion to John and his heirs; and as to the rest of the lands and advowsons belonging to himself or his wife (excepting lands to the value of £100), John and his wife agree to levy a fine to certain persons and their heirs to the intent that they shall refeoff John with the lands of which he is solely seised for his life, remainder to Fulk and the heirs of his body by Elizabeth, remainder to the right heirs of John; and as to the lands of which John is jointly seised with his wife, to the intent that they shall levy a fine in favour of John and his wife for their joint lives, remainder to Fulk and the heirs of his body by Elizabeth, remainder to the right heirs of John. Lord Stafford covenants to pay to John £1,000 at certain specified dates, to secure which Lord Stafford has entered into a recognizance in Chancery—this recognizance to be void on payment, or on failure by John in the performance of any of the covenants to be by him performed. John, on the other hand, has

[1] Madox, Form. no. 165. [2] Ibid nos. 345, 745.
[3] Ibid no. 749; for another point in which the use was superior, see vol. ii 594 n. 5; Bk. iv Pt. I. c. 2.
[4] No. 170.

entered into a recognizance in Chancery to repay to Lord Stafford 500 marks if Elizabeth dies before the age of thirteen. Lord Stafford, at his own costs, is to purchase a licence from the king permitting John to enfeoff Fulk and Elizabeth and the heirs of their bodies with the land to the value of 200 marks. After the marriage Fulk and Elizabeth are to be maintained by John till Elizabeth is thirteen, and John is, up to that time, to have the custody of the land to the value of 200 marks. This illustration shows us that it was possible by various devices and by many different instruments to give effect to an elaborate family settlement. It shows us, too, how great was the simplification rendered possible by the development of the use; and it therefore gives us one very strong reason for its popularity.

It will be apparent from this illustration that the levying of a fine was generally a part of these settlements of property. I have already said something of the reasons for the popularity of the fine.[1] In this connection two other reasons must be noted which made the adoption of the conveyance by way of fine a prudent measure if any elaborate disposition of property was to be adopted. In the first place, settlors could by using a fine effect by one instrument objects to fulfil which at least two instruments would otherwise have been needed.[2] But, in the second place, by far the most important advantage in using the fine consisted in the fact that the settlor thereby obtained some sort of guarantee of the validity of his dispositions. The Year Books make it quite clear that during the whole of this period the court exercised a large control over fines. As we have seen, their capacity to bind the interest of the married woman probably springs from this fact.[3] The court was, of course, bound to see that the king's interest was not adversely affected.[4] But, quite apart from this reason for the exercise of their control, which rested to some extent upon grounds of public policy, they interfered with a view to the maintenance of legal principle and correct conveyancing. "We will never allow any fine which we know can be set aside," said Spigurnel, J., in 1313-1314;[5] and there are many cases in which the court declined to receive a fine which appeared to them to be irregular, or only received it conditionally upon certain modifications being made.[6]

[1] Above 240-245. [2] Above 239. [3] Above 245.

[4] Staunford, Prerogative f. 31, "And note that if the justices before whom the fine shall be levied be informed that the lands be holden of the king; and that so appear to them by any record, they will not take the fine till they have seen the licence [to alienate] nor yet engross it till they have received a writ out of the Chancery called *Quod permittat finem levari* by which they may be fully certified of the king's pleasure;" cp. above 246 n. 2, for the rule in the case of a recovery.

[5] Eyre of Kent (S.S.) ii 201.

[6] The following are a few instances:—Y.BB. 33-35 Ed. I. (R.S.) 214-216 (not admitted); 1, 2 Ed. II. (S.S.) 14, 37 (not admitted); 2, 3 Ed. II. (S.S.) 4, 5 (questioned

Hence the fact that a certain set of limitations had been made by fine afforded at least a prima facie guarantee that those limitations were such as the parties could legally make.[1] Certainly as late as the sixteenth century the fact that the judges had received a fine could be advanced as an argument for the validity of the limitations contained in it.[2] It is impossible to exaggerate the importance of this action of the judges both to the parties to a conveyance and to the art of conveyancing. The parties were given the chance of avoiding a fatal error before it was too late. The conveyancers were instructed as to the kind of limitations which they could safely employ. Points which in later law were only determined upon the interpretation of a conveyance already completed could in this period be determined before the conveyance was finally settled. We shall see that the system of oral pleadings in use at this period admitted of amendment and adaptation far more freely than the later system of written pleadings, under which the parties were tied down to the mode of presenting their case which they had selected before they came into court.[3] Just in the same way the mediæval proceedings on a fine instructed the parties before it was too late as to the sort of limitations which the law allowed, instead of leaving them to make their conveyances at their own risk. In the earlier stages of the development of the law of conveyancing, as in the earlier stages of the development of the law of pleading, the principles of the law and the forms apt to give effect to those principles were settled by the legal profession under the control of the court. It is only when the principles have been thus settled that the legal profession can be left to apply these principles and use these forms without the need for this constant and continuous supervision; for it is not till then that the lawyers, having acquired a stock of established common forms large enough to suffice for common cases, can dispense with the aid of the court, except in cases which for one reason or another are uncommon. It is when this result has been reached that

and corrected), 97, 147 (notes as to the manner in which it should be drawn); 6 Ed. II. (S.S) i 118, 129 (not admitted); 12, 13 Ed. III. (R.S.) 92, 370 (not admitted); 13, 14 Ed. III. (R.S.) 76 (criticized), 246 (not admitted as drawn), 300 (admission of fine criticized); 14 Ed. III. (R.S.) 176 (not admitted); 14, 15 Ed. III. (R.S.) 34 (in part refused), 74, 76 (not admitted), 84 (corrected); 15 Ed. III. (R.S.) 128 (not admitted); 16 Ed. III. (R.S.) ii 58 (criticized), 174, 176 (in part refused); 20 Ed. III. (R.S.) i 160 (wording settled); it would seem from Plowden's words in Colthirst v. Bejushin (1551) Plowden at p. 34 that at the beginning of the sixteenth century the court still exercised some censorship over the fines which it was willing to admit.

[1] Not necessarily an absolute guarantee, cp. Y.B. 33-35 Ed. I. (R.S.) 434-438; and it might, of course, be shown that the fine was for some reason not duly levied, see above 240.

[2] (1562) Willion v. Berkley, Plowden at p. 252.

[3] Below 635, 655.

we begin to see in the following period the growth of that influence of the conveyancers upon the law to which I have already referred.[1]

Mediæval Conveyancing and the Development of the Law

I have already referred to some of the cases in which the mediæval conveyance illustrates the development of the law. The history of the gradual delimitation of the boundary between the ecclesiastical and the lay jurisdictions; the history of the gradual disappearance of restraints on the freedom of alienation, whether in the interest of the lord or in the interest of the heir; the gradual commutation of labour services for money rents; the extraordinary variety of incorporeal rights known to the mediæval land law; the working of the statutes of mortmain; the part played by the corody in mediæval society; the mode in which services, professional or otherwise, were remunerated in this period; the manner in which the common law endeavoured to fill by means of common law conditions the wants which the use was destined to supply more adequately; the gradual prohibition of the devise of land—are, as we have seen, abundantly illustrated in the charters and deeds which we possess. We shall see that these same documents shed a similar light upon other branches of the law. Thus, the gradual manner in which the position of the married woman in the common law was arrived at;[2] the old customs as to the succession to chattels;[3] the large part played by contracts under seal, owing to the lack of an effective method of enforcing executory simple contracts,[4] can equally well be illustrated from the same sources. Here I shall call attention to the manner in which these collections of charters can be made to illustrate the personal and human side of legal development. Just as the reporters in the Year Books entertain us with many side-lights and personal touches which tend to disappear when law reporting becomes a definite art; so these mediæval conveyances often contain documents throwing much light both on the manners of the day and upon prevalent legal conceptions, which we necessarily lose when the conveyancer, having at his hand a printed store of blank forms, need no longer accumulate precedents of actual legal transactions.

Madox prints among his documents an agreement, probably of Henry III.'s reign, between the Earl Marshal and the Earl of Gloucester making a truce for sixteen days.[5] The document

[1] Above 218-219. [2] Below 522 seqq. [3] Below 551-553.
[4] Below 420. [5] No. 155.

takes the same form as any private convention between ordinary persons—thereby illustrating not only the disturbed state of the country, but also the non-existence of a clear distinction between public and private law which is characteristic of feudalism. The large prerogative rights exercised, even in England, by some of the great lords on the Marches of Wales are illustrated by a pardon issued by William Montagu, Count of Salisbury and Lord of the Isle of Man and Denbigh, to one Richard Dorel of all manner of trespasses, felonies, robberies, arsons, and homicides committed within the lordship of Denbigh.[1] The dangers of travel are illustrated by a document of the thirteenth century in which the contents of a document are certified because it is dangerous to send the original.[2] A good illustration both of the manner in which all kinds of rights were dealt with as if they were tangible property, and of the corruption of the church just before the Reformation, is afforded by a document of the year 1526,[3] in which the Priory of Stamford leases to one Isaac Mychell for two years "all the comodyteys, profetts, and advantageys that by reyson or occasyon off all indulgences, pardons, and faculteys be gyffen to the seyd Monastory by divers Holy Fathers Popes of Rome . . . so thet yt shal be lefull to the seyd Isaac and to hys lafull assignes in the Dyocys of Salysbury, Wynchestre, Bathe, Excetter, Saint Davyd, London, and Canterbury, to declare the seyd Pryvylegeys and pardons, and to gedder the brotherhed and devocion of good Cristyn peple to hys best advantage and profe, dewrynge the seyd terme of ii yers." A document more creditable to the religious houses is a deed whereby the Abbey of Eynsham grants £5 a year to a poor student at Oxford.[4] The financial straits to which these houses were sometimes reduced are illustrated by the bonds or recognizances into which they entered to repay sums borrowed either from the Jews or from firms of Italian merchants.[5] The large freedom which at the beginning of the thirteenth century was allowed in making agreements is illustrated by a fine of the year 1219, which at the present day would be held to be void for champerty.[6] The agreement, which was made between Stephen de Fretewelle and the abbot of Eynsham, was as follows: Stephen released his claim to a quarter of a knight's fee, and in return the abbot granted two corodies to himself and his wife, promised to get a marriage (without disparagement) for one of Stephen's daughters within

[1] Madox, Form. no. 705 (1352); for the Lords Marchers see vol. i 120-122.
[2] Ibid no. 12 (1257). [3] Ibid no. 251.
[4] Eynsham Cart. i no. 361 (1268).
[5] Rievaulx Cart. 409-411 (1280). [6] Eynsham Cart. i no. 186.

the next five years, gave him an acre of land in fee, and finally promised to aid him in any claims to land which he could discover, on the terms that half the land so recovered should belong to the abbey in free alms; Stephen promising to enter into no compromise without the consent of the abbey.[1]

These are but a few illustrations of the sidelights upon contemporary manners which the conveyances of this period afford. If we compare their form with the form of the documents which are designed either to evidence or effect a conveyance properly so-called, they afford perhaps the most striking evidence of the vast influence which ideas and principles and machinery, which originated in the first instance in the land law, had upon all branches of the common law of the Middle Ages.

§ 13. Special Customs

The common law had created certain types of tenure, certain kinds of estate, certain modes of conveyance, and certain legal doctrines relating to land-holding which prevailed almost universally within the jurisdiction of the common law courts. If we think of the mass of local customs which made up the land law in the eleventh century we may well admire the universality of its rules. But in spite of all its efforts one or two survivals still remained to remind us of the old order. We have seen that the large power which landowners once had of making what "laws" they pleased to govern the disposition of their property had been reduced to a capacity to limit some one or more of a fairly definite number of estates,[2] just as the large variety of special customs which regulated the tenure of land had given place to the fixed categories of certain definite tenures.[3] But just as the old uncertainty as to the powers of the landowner survives to-day in the uncertainty as to the legal possibility of certain kinds of estates,[4] so the old variety of customs which once regulated the tenure of land survives in certain special customs which form exceptions to the regular types of tenure. It is with these special customs that I propose to deal in this section.

[1] "Predictus etiam abbas et successores sui ad expensas suas adjuvabunt predictum Stephanum ad deliberandum et recuperandum terras suas et jura sua scilicet, etc. [naming certain lands], et in omnibus aliis locis ubi ipse Stephanus et heredes sui ex parte sua vel abbas et successores sui ex parte sua poterunt inquirere quod jus ipsius Stephani jaceat. Et cum abbas vel successores sui aliquam predictarum terrarum recuperaverint, medietas tocius illius conquesti remanebit abbatiæ de Egnesham in liberam et perpetuam elemosinam. . . . Et predictus Stephanus sive heredes . . . non placitum nec pacem inibunt de aliqua terra in qua predictus Stephanus jus vendicare possit sine voluntate consilio vel assensu predicti abbatis et successorum suorum et ad eorum custum."

[2] Above 102-105.

[3] Vol. ii 201, 260, 348; above 34-54.

[4] Above 105.

We have seen that in the twelfth and thirteenth centuries the presence of a masterful common law was tending to reduce many of these customs to insignificance. Moreover, the action both of the king and of the larger landowners was, in the interests of certainty and fixity, tending to produce a similar result. Thus King John, in the third year of his reign, granted to the Archbishop of Canterbury and his successors the power to change land held of the see of Canterbury from gavelkind to knight service;[1] and the fact that the king possessed this power himself and could grant it to others was recognized by the courts.[2] Simon de Montfort in 1255 granted to the burgesses of Leicester that their lands should for the future descend to the eldest, and not, as heretofore, to the youngest son.[3] Similarly, it was held that, in the event of lands subject to a special custom escheating or forfeiting to the lord for any cause, the special custom ceased to apply when the lands were in the hands of the lord.[4] It is clear that such principles as these make for the extinction of special customs. But in the course of the fourteenth century the independent position of a law which could only be changed by Parliament, and the growing fixity of the land law, caused a change in the legal point of view.

The beginnings of this change can be seen in the arguments used in a case which was heard in the Eyre of Kent of 1313-1314.[5] The point at issue was the capacity of the lord to change by his deed, which had been confirmed by the crown, the tenure of land from gavelkind to knight service. It is clear that the opinion was gaining ground that, whatever might be the power of the lord over land held by villein tenure, or by tenure in ancient demesne, such a change was not possible in the case of land held by a custom like gavelkind which, being a free tenure, was more intimately connected with the common law.[6] To permit such a change

[1] See the charter in Robinson, Gavelkind (5th ed.) 56; cp. ibid 18 for the petition of the monks of Canterbury to Henry II., in which it is stated that Lanfranc, on the orders of the king, turned his threngs and drengs into knights for the defence of the realm.

[2] Ibid 57-61.

[3] See the charter printed ibid 66.

[4] In a case before the Justices in Eyre, Itin. Kanc. 21 Ed. I. r. 53 (Berewicke), cited Robinson 63, 64, the county said that gavelkind could be turned into frank fee by the grant of the king or archbishop, by escheat to the lord, and, "when the lands are given back into the hands of the lord, the services being too heavy for the tenant, without any expectation of having them again," but that in this case the land would be still gavelkind if the lord restored the land on any conditions.

[5] The Eyre of Kent (S.S.) iii 153-159.

[6] "*Spigurnel, J.*—I put the case that a lord of ancient demesne releases the services due from the socman, and grants and confirms the tenements to him to hold of him, the lord, by knight service. The nature of the soil is changed, for then it is frank fee. *Friskeney.*—Again the case is not a parallel one, for socmen are not so near the common law as those who hold by gavelkind tenure; for these latter can bring writs of novel disseisin and all other writs under the common law, etc., and so it takes more

would be in effect to change the common law; and it was probably this reason which induced the judges in this case to doubt even the king's power to make such a change.[1] Moreover, there are indications of a feeling that, if such changes were permitted, they might operate unfairly to other persons, whether lords or tenants, who had interests in the land.[2] But it is clear that both these lines of reasoning logically lead to the conclusion that none of these customs are changeable at the will of king, lord, or tenant. The customs which regulated the rights of those who held by villein tenure or by the tenure of ancient demesne were fast attaining fixity, and were coming to be regarded as a part of the common law.[3] Thus it is not surprising to find that in 1376[4] very considerable doubts were entertained as to the power of a lord to change the tenure of lands held by the tenure of ancient demesne. It was very strongly contended that, though a deed which purported to effect this change might be operative as between the parties to it, it could not affect others, and could not therefore change the nature of the tenure.[5] This particular contention did not wholly prevail in the case of lands held either by the tenure of ancient demesne or by copyhold tenure; for in both cases the land could be enfranchised by the lord.[6] But, subject to this exception, this view was in substance adopted. These customs were a part of the common law. On the one hand, they could not be created de novo even by the

to change the nature of soil held in gavelkind than of soil held in socage," ibid 155; cf. Y.B. 5 Ed. II. (S.S.) (1312) 16 where Bereford, C.J., held that "though that which is the king's ancient demesne can be turned into frank fee, yet that which is frank fee cannot be turned into ancient demesne."

[1] The case was ultimately adjourned into the Common Bench, and the king wrote to the judges informing them of his right to make such a change, citing the charter summarized at p. xxxi n. 1 of the Y.B.; but no judgment was given; as Mr. Bolland says, the inference is that the judges "could not see their way to accept the theory set out in the king's letter," the Eyre of Kent iii xxxi.

[2] See the arguments of Malmerthorpe, Passeley, and Ingham set out ibid at p. 157.

[3] Vol. ii 381, 522; above 201; "that court (a court of ancient demesne) is as much governed by its custom, and it is their law there, as this court is governed by common law; . . . and in like manner their customs are as well defined between them for the purpose of giving judgment as the common law is for a Justice to know it," Y.B. 20 Ed. III. (R.S.) ii 438 *per* Grene *arg.*

[4] Y.B. 49 Ed. III. Hil. pl. 12.

[5] "*Kirton.*—Il poit estre que per usage deins un certain manor d'auncient demesne, que le fitz puisne serra enheritable de la terre, que est tenu per customes de manor, et tallages, et autres bondes services; jeo die que mesque le seignior de manor release al tenant tout son droit, issint que il ad perdu son seigniory pur tant . . . jeo die que per tant la nature de la tenancy n'est my chaunge eiant regarde al inheritance de la tenancy devers l'heire. . . . *Persay.*—Si la terre soit tenus de son seignior d'antiquity, issint que le seigniory en sa main fuit frank fee, il poet estre per son fait la nature de tenancy serroit change devers le seignior: mes nemy devers estranges person, que ne claimont riens de l'estate le seignior, come en nostre cas nous sumus ore;" for other applications of this principle see above 41, 64-65, 212; below 259, 264.

[6] Viner, Ab. *Ancient Demesne* I and K.

crown;[1] on the other hand, they could not be altered by the caprice of landowners,[2] or by the accidents of such events as escheat and forfeiture.[3] These customs were inseparably annexed to the land, and nothing short of an Act of the legislature could change them.[4]

Thus it has happened that certain of these special customs, dating back to the days before the common law, have survived until modern times. I shall deal here with three of the most important—Gavelkind, Tenure in Ancient Demesne, and certain of the Borough Customs.

Gavelkind.[5]

There have been many suggested derivations of the term "gavelkind."[6] The true derivation connects it with the old English *gafol*, or *gavel*, which means rent or a customary performance of agricultural services. "The tenant from whom such services were due was called a gavel man; and 'gavelkind' being taken as a compound of this word 'gavel' and 'gekynde,' which is nature, kind, quality (usually appearing under the form 'gafol cund' in the most ancient records), the proper signification of the term will be land of the kind or nature which yielded rent, or 'censual land' . . . as distinguished from knight service land, which being held by free military service yielded no 'cens' or rent in money, provision, or works."[7] No doubt in early days the term "gavelkind" denoted land held by this particular tenure;[8] and much land held by this tenure became the free socage tenure of later law. But in the later common law the meaning of the term has been altered. It has come to be used generally as the name for the custom by which lands in Kent are, in the absence of proof to the contrary, presumed to be affected;[9] and sometimes, in later law, to express the fact that lands, whether in Kent or elsewhere are divided between male heirs on the death

[1] Y.B. 37 Hy. VI. Trin. pl. 3 *Littleton* says, "Le Roi ne poet faire ne granter Ancien demesne a ce jour . . . le Roy ne poet faire terres devisables a ce jour, et ensement que le puisne fitz sera inheritable sicome il est la deins la dit ville, et uncore le Roy ne poet granter ce a cest jour;" Coke, Copyholder § 31; above 258.

[2] Y.B. 49 Ed. III. Hil. pl. 12 cited above 258 n. 5.

[3] Y.B. 14 Hy. IV. Mich. pl. 6 (p. 7) *per* Hankford; in Y.B. 11 Hy. VII. Trin. pl. 6 this is taken as settled law.

[4] "If gavelkind lands escheat or come to the crown by attainder or dissolution of monasteries, and be granted to be held by knight service or *per baroniam*—the customary descent is not changed; neither can it be but by Act of Parliament; for it is a custom fixed to the land," Hale, H.C.L. 312.

[5] The most complete modern account will be found in Robinson on Gavelkind, 5th edition, 1897, by C. I. Elton and H. J. H. Mackay.

[6] Robinson 1-11.

[7] Ibid 6.

[8] Ibid 7—before the statute of Quia Emptores we often get charters in which the land is granted "tenendum in gavelkende."

[9] Robinson 8.

of the ancestor.[1] Here I shall use the term gavelkind in the former sense. We must consider in the first place the Kentish Custumal[2] and its contents, and in the second place the reasons for the existence of this peculiar set of customs in Kent.

(1) The Kentish Custumal and its contents.

"These are the usages and customs," so runs the Kentish Custumal, "the which the commonalty of Kent claimeth to have in the tenements of gavelkinde, and in the men of gavelkinde, allowed in Eire before John of Berwike and his Companions, Justices in Eire in Kent, the twenty-first year of the reign of King Edward the son of King Henry." The more important of these privileges were the following: All Kentish men were born free. From Edward I.'s time onward the fact that a man's father was born in Kent was a sufficient answer to a claim to him as a villein;[3] and from Henry VI.'s reign it was a sufficient answer to show that the person claimed was born in Kent.[4] They might freely sell or give their lands and sue for the same in the king's courts, even as against their lords. There was no escheat for felony nor was the king entitled to year, day, and waste—"the father to the bough, the son to the plough;"[5] nor was the felon's wife deprived of her customary dower. But neither rule applied to treason, or to the case where a man fled for suspicion of felony or where he was outlawed or abjured the realm;[6] nor were the goods of the felon exempt from forfeiture.

[1] Bracton e.g. says, f. 374a, "Sicut in gavelkind, vel alibi ubi terra est partibilis ratione terræ;" it is pointed out, Robinson 10, 11, that in the mediæval period the term is not applied to all land which is partible amongst heirs, cp. Y.BB. 2 Ed. III. Trin. pl. 5, and 5 Ed. III. Mich. pl. 107 there cited; but in later law it is used of all partible land, e.g. in a Private Act of 21 James I. c. 6, and in Wiseman v. Cotton (1664) 1 Sid. 135, 137. As Sir Paul Vinogradoff has pointed out (English Society 93, 94), in Kent the custom may be regarded as "county law," whereas elsewhere it is rather the product of "manorial usage."

[2] For the texts of the custumal see Robinson 222-228. It is to be found in Tottell's edition of Magna Carta and the statutes published in 1556; Coke, on that account, gives it the title of the Statutum de Consuetudinibus Kanciæ. It is printed in the Record Commission's edition of the Statutes i 223-225 among the statutes of uncertain date; for these statutes see vol. ii App. III.; we have no official text, but all the rules are authenticated by early records, P. and M. ii 270 n. 1.

[3] Fitz., Ab. *Villenage* pl. 46, "Sans pluis enquery fuit agarde que elle suit fraunke, etc., pur ceo que il n'ad villein en Kent;" but this custom was not primæval, as there had been villeins in Kent since the Conquest, Robinson, op. cit. 224-225.

[4] Y.B. 7 Hy. VI. Pasch. pl. 27—*Candish.*—"En le County de Kent ils ont tiel custome, que chescun né deins le County, nient contristant que son pere suit nief, l'issue sera frank." *Martin.*—"Ceo est per Parliament, et un Statut eut fait."

[5] For other instances of a similar custom in Gloucester and Hereford see Robinson 177, 178. The custom is again so stated in the De Prærogativa Regis—perhaps to show specifically that the king's right to year, day, and waste was barred as well as the lord's escheat. It appears that according to the oldest versions the son goes to the "lowe" or hearth, P. and M. i 166 n. 2; for these rights of king and lord see above 68-70.

[6] The Eyre of Kent (S.S.) i 93.

The wife was entitled to a half of the land of which her husband had been solely seised during the marriage for her life, or so long as she remained chaste and unmarried.[1] We have mention of the hue and cry—a curious archaic procedure to be followed to recover the land if the conditions to be observed by the widow were broken.[2] The husband was entitled, on the death of his wife, to the half of the lands which she held for an estate of inheritance, for his life or till he married again, whether or no issue was born of the marriage.[3] Upon the death of the ancestor the land was divided among the sons, and the youngest was to have the homestead. Here again we have mention of a curious procedure by which this partition was effected.[4] A child under fifteen was under a guardian who must be assigned by the lord; but the guardian was appointed from among those relatives of the child who could not inherit the land, and he must account for the profits.[5] At fifteen the child could alienate his land—a reminiscence of the days when the age of majority varied according to the circumstances of different classes of society.[6] In the case of personalty the old rules which gave one third to the widow, one third to the children, and allowed the deceased to dispose of the remaining third, were followed. We shall see that there is some reason to suppose that these rules formed at one time the common law of the land.[7] Besides, there were many less important privileges in matters of procedure, amongst which may be mentioned the curious rule observed in the case of the tenant who wished to recover land which his landlord had taken for non-payment of rent. The custumal embodies an old

[1] Robinson 139, 157; early records make it quite clear that as at common law alienation by the husband would not bar the wife's claim to dower, ibid 148.

[2] Ibid 143, 144; in a case tried *coram rege* 17 Ed. III. Trin. rot. 32 Kanc. (there cited) the jury found "that a widow would lose her dower of gavelkind land, if she married again or if she bore a child in her widowhood, wherever in the County the child might be heard to cry, provided always that the heir or reversioner next in succession came in person . . . and raised the Hue and Cry immediately after the birth."

[3] Ibid 128-138.

[4] Ibid 116, 117. The old custom was obsolete by Elizabeth's reign.

[5] Ibid 158-160. It appears that the lord could distrain the guardian to account under the old law, and, according to Lambard, might even have been held liable to make good deficits in the account. In the Eyre of Kent, however, of 1313-1314, iii 43, it was said by the assize in one case that the lord had the guardianship, but that the nearest in blood could acquire it from the lord at his own cost; the person so acquiring it must render an account, and the sum which he paid for the wardship was allowed in the account; moreover, it was said that he could assign over his guardianship to another.

[6] Vol. ii 98; here the custom has been strictly construed, as it is only a feoffment which can be made by a child of fifteen, Robinson 166; and c.p. In re Maskell and Goldfinch's Contract [1895] 2 Ch. 525; it would appear from Y.BB. 11 Hy. IV. Mich. pl. 61, and 21 Ed. IV. Pasch. pl. 10 that this restrictive construction was applied at an early date.

[7] Vol. ii 94; below 550-554.

Saxon proverb which, while seeming to give the right of recovery, really denies it by requiring an impossible condition to be performed by the tenant.[1]

These are some of the more salient features of the *Lex Kentiæ*. No doubt the greater part of Kent was subject to it; but it did not apply to lands held anciently by military service, grand serjeanty, or frankalmoin.[2] The exceptions, however, tended to diminish, owing to the fact that the presumption was always in favour of the application of the custom, so that much land, not really subject to the custom, became subject to it from lack of evidence to the contrary.[3] The same cause has often rendered almost nugatory many of the disgavelling Acts passed from time to time by the legislature.[4]

(2) The reasons for the continued existence of these Kentish customs.

If we look at these customs we shall see many things which may remind us of the days before the royal courts drew the bold lines of the mediæval land law, and substituted a uniform common law for many similar yet divergent local customs. The partibility of the land among all the sons, the old rules governing that partition, the allotment of the hearth to the younger son, the absence of escheat for felony, the rule as to the age at which a son can make a feoffment, the old procedure by which the landlord could recover the land if the rent were not paid, the quaint rules as to the penalty which the tenant must pay who wished to recover land thus forfeited—all are archaic traits and genuine survivals from the days before the common law. But why did they survive in Kent? In Domesday Book there is no sign that Kent will develop a law of its own;[5] and yet such a

[1] Just as there were differences in the procedure in real actions in the case of gavelkind lands which date from Henry III.'s charter to the county (Robinson 206; the Eyre of Kent (S.S.) iii 209) so, instead of the ordinary writ of cessavit, there was a special action of gavelet (Robinson 194 seqq.); if the landlord had seized the land in this action, and the tenant desired to recover it, "Let him nine times pay and nine times repay the arrears and five pounds for his wergild before he shall have his tenement again;" cp. P. and M. ii 269 n. 4, "It is one of those humorous rules of folk-law which, instead of telling a man that he cannot have what he wants, tells him that he may have it if he will perform an impossible condition;" cp. Robinson 201 for a similar case in connection with the castle guard rents by which estates were held of Rochester Castle; it was said that if such rent fell into arrear it was liable to be doubled and multiplied at each return of the tide in the Medway; see on the whole subject Borough Customs (S.S.) ii clvii-clix, appendix on the sursise of rent.

[2] Robinson 49, 50, 74. [3] Ibid 44.

[4] For these Acts see ibid 67-72; at p. 69 it is said, "None of the Disgavelling Acts contained any schedule of lands affected, which have therefore to be ascertained by the help of licences of alienation, inquisitions *post mortem*, royal grants, wills, private Acts, and such like records; and since it is difficult to procure evidence of this kind with respect to small detached parcels, it is found in many cases that proof of identity is gone, and that by force of the presumption . . . the lands have returned into the custom of gavelkind."

[5] P. and M. ii 270; Vinogradoff, Manor 318.

Lex Kantiæ is developed between the period of the Conquest and Edward I.'s reign. There being little doubt but that the contents of the custumal are genuine survivals, the thing which it is difficult to explain is, not the provisions of the custumal, but the fact of their survival. For that explanation we must look, as Maitland points out, not so much to legal as to economic and social history.[1] The best explanation seems to be found in the fact that the geographical position of Kent gave to it social and economic advantages which were not enjoyed by the rest of the country. It lay on the great highroads between England and the Continent; and these highroads are "the arteries along which flows money, the most destructive solvent of seigneurial power." The lords of Kentish land preferred money to feudal rights; and the inhabitants were prosperous enough to pay it. Dwelling between the seaport towns and London, they had a choice of pursuits open to them; and those who engaged in agriculture found that agriculture paid better than in districts more remote from the great world of politics and trade.[2] For these reasons "Kent seems to have proceeded from the tribal system and the independent village system directly towards commercial husbandry, without going through the intermediate stage of manorial husbandry which was common to the rest of England."[3] The inhabitants were able, in fact, to retain old customs and old rules because the new rules and classifications of the common law were unsuited to the peculiar conditions of Kent.

The men of Kent were proud of their peculiar customs and their peculiar law, and, inverting cause and effect, they regarded them as the cause of the prosperity of the county. In course of time additions were made to the custumal for which there was no warrant in early law;[4] and, on the other hand, changes both in substantive and adjective law rendered other parts of the custumal absolete. But much of the law of Kent remains, and still forms a unique survival in the law of land held by free tenure of certain of the customary rules which prevailed before the birth of the common law.

Ancient Demesne.[5]

The ancient demesne of the crown was the land which belonged to the crown in 1066—on the day when King Edward

[1] P. and M. i 166. [2] Ibid 166, 167; ii 269, 270.

[3] Vinogradoff, Manor 318; P. and M. ii 270.

[4] E.g. the custom to devise land, Robinson 185 seqq.; for an attempt to prove that no Englishry was ever presented in Kent, which deservedly failed, see the Eyre of Kent (S.S.) i xxxv-vii, 12, 19-20.

[5] Vinogradoff, Villeinage 89-126; P. and M. i 366-389; Blackstone, Law Tracts, "Considerations on the question whether tenants by copy of the Court Roll according to the custom of the manor, though not at the will of the lord, are freeholders qualified to vote in elections for knights of the shire" (1758).

was alive and dead. To ascertain whether or no a given piece of land was ancient demesne, Domesday Book was the only evidence admitted; and its evidence was conclusive.[1] The king was frequently acquiring other land by escheat, forfeiture, or other titles; but this land was not ancient demesne. Conversely, when the king gave away parts of his ancient demesne, the land did not on that account cease to be subject to the rules peculiar to it when it was part of the demesnes of the crown. This, as Maitland points out,[2] is simply an application of the general rule that "the escheat of a mesne lordship should leave unaltered the rights and duties of those who are the subjects of that lordship, and if a lord puts a mesne between himself and his tenant that tenant should neither gain nor lose by the change."

In the days when franchises and immunities abounded the king naturally enough acquired for his estates a liberal measure of these advantages desired by all landowners.[3] Thus, just as on the manors of many another franchise holder, so on these manors of the ancient demesne, there is much which is exceptional from the point of view of public law. "The king's manor is treated as a franchise isolated from the surrounding hundred or shire, its tenants are not bound to attend the county court or the hundred moot, they are not assessed with the rest for danegeld or common amercements or the murder fine, they are exempted from the jurisdiction of the sheriff, and do not serve on juries or assizes before the king's justices; they are free from toll in all markets and custom houses. Last, but not least, they do not get taxed with the country at large, and for this reason they have originally no representatives in Parliament. . . . On the other hand, they are liable to be tallaged by the king without consent of Parliament by virtue of his private right as opposed to his political right."[4]

It is not these exceptional rules of public law which make the manors of the ancient demesne important in the history of the land law. It is the fact that there exists upon them a peculiar species of tenure. There were on these manors tenants free and unfree, holding their land upon the ordinary tenures known to the common law. But in addition there were found on it a third

[1] Vinogradoff 90; Y.BB. 33-35 Ed. I. (R.S.) 308; 2, 3 Ed. II. (S.S.) 60, 61; 11, 12 Ed. III. (R.S.) 164; 49 Ed. III. Trin. pl. 8; but the allegation that certain tenements in a manor of the ancient demesne were at common law might be tried by the country, 9 Ass. pl. 9; or *semble* by specialty, Y.B. 16 Ed. III. (R.S.) ii 562 *per* Thorpe *arg.*; as Maitland points out, the rule that Domesday Book is the only evidence may be no later than the fourteenth century, P. and M. i 382 n. 1.

[2] P. and M. i 367, 368; Y.B. 11, 12 Ed. III. (R.S.) 340, 342; for the distinction between lands held *ut de corona* and *ut de honore*, which is one instance of this principle, see above 41, 64-65, 258 n. 5.

[3] Vol. i 91.

[4] Vinogradoff 92 and references there cited.

class of tenants who do not distinctly belong to the class either of the free or of the unfree tenants. We learn from Bracton that there were on the ancient demesne of the crown, besides the ordinary freeholders and the ordinary villeins, a class of villein socmen; a class, that is, holding in privileged villeinage by servile yet certain services, who could not be ousted from their land so long as they performed these services.[1] All three classes of tenants were affected by many of the peculiar rules of public law which applied to the ancient demesne.[2] It is only this third class who held by the peculiar tenure which is known as tenure in ancient demesne.

The main characteristic of this peculiar tenure is well described by Blackstone as follows: "The truth is," he says, "that these lands are of such an amphibious nature that when compared with mere copyholds they may with sufficient propriety be called freeholds; and when compared with absolute freeholds they may with equal or greater propriety be denominated copyholds."[3] They resembled lands held by villein tenure in that the ordinary real actions were not available to the tenant;[4] and even after villein tenure had become copyhold, and had got the protection of the action of ejectment, that action was never extended to them.[5] They differed from lands held by villein tenure in the fact that these tenants were protected in their holdings by two royal writs —the little writ of right and the writ of monstraverunt.[6] The little writ of right was directed to the bailiffs of the manor if the land was in the hands of the crown, to the lord if it had been granted to a subject; and it ordered the bailiffs or the lord, as the case may be, to do full right "according to the custom of the manor" to the complainant. The case was heard in the court of the manor; but the proceedings of that court could be brought by the usual methods before the courts of common law.[7]

[1] ff. 7b, 208b; Bracton also deals in these passages with the "conventioners;" for these see above 30; cp. Y.B. 1, 2 Ed. II. (S.S.) 92 for a disquisition on this subject taken from Bracton.

[2] See Stubbs, C.H. ii 566 n. as to tallage; in the case of the Town of Leicester (1586) 2 Leo. 191, Shute, J., said of the privilege of freedom of toll, "An inhabitant within ancient demesne, although he be not tenant, shall have the privilege."

[3] Blackstone, op. cit. 145.

[4] See Y.B. 5 Ed. II. (S.S.) (1312) 76 for an attempt to bring replevin for a seizure on land in ancient demesne, on the ground that it was merely a personal action; the court inclined to the view that the action did not lie, and this was later settled to be the law, below 267 n. 6; Alden's Case (1601) 5 Co. Rep. at f. 105a; cp. 21 Ed. IV. Pasch. pl. 3.

[5] Bk. iv Pt. II. c. 1 § 1.

[6] App. Ia (12) (13); cp. Ramsey Cart. iii no. 560 for a plea on a writ of monstraverunt.

[7] Vol. i 178; Y.BB. 33-35 Ed. I. (R.S.) 236; 16 Ed. III. (R.S.) ii 560; for a case in which a plea, begun by little writ of right, was removed into the Bench on an allegation that the king by his charter had converted the land into freehold see Y.B.

If the manor was not in the king's hands such a writ would lie even against the lord himself, who could be distrained by the manor court to appear.[1] The little writ was thus the appropriate remedy for the individual tenant if he was disturbed in his holding. The writ of monstraverunt was a remedy by which all the tenants collectively could complain of some infringement of the custom. It was really a complaint to the king; and in form it did not differ much from the form of many other complaints which were made to the king by various classes of his subjects.[2] There is some evidence that it did not become a writ of course for the tenants in ancient demesne till quite the end of the thirteenth century.[3] By means of these two writs, therefore, the tenant in ancient demesne was put on a level with the freeholder in point of the protection which he got from the king's court. But if we look at some of the services which these tenants were obliged to do we shall find a large number of the principal features of villein tenure. Thus at King's Ripton the tenants in ancient demesne must work one day a week at whatever work their lord assigns them, and three days a week in August and September; they pay arbitrary tallage and merchet; they cannot have their sons ordained or leave the manor without the lord's licence.[4]

What, then, is the explanation of this curious class of men? The best explanation seems to be that it was a genuine survival from the days before the royal courts had grouped all tenures into the two classes of the free and the unfree.[5] All the accounts of it which we possess are connected with the settlement made at the Conquest.[6] Its name and characteristics show that it is ancient. There were many sokemen before the Conquest whose services were various, who could not be grouped under any of the types of tenure created by the common law.[7] That these

3, 4 Ed. II. (S.S.) 1-3. As was the case with the copyholder, the little writ could by protestation be made to serve the purpose of an assize of novel disseisin and other real actions, Y.B. 8 Ed. II. (S.S.) 96, 97.

[1] Select Pleas in Manorial Courts (S.S.) 114-121.

[2] Vinogradoff 102-104, "When for some reason right could not be obtained by the means afforded by the common law, the injured party had to apply to the king by petition. One of the most common cases was when redress was sought for some act of the king himself or of his officers, when the consequent injunction to the common law courts or to the Exchequer to examine the case invariably began with the identical formula which gave its name to the writ by which privileged villeins complained of an increase of services."

[3] P. and M. i 371 n. 3—Maitland says that it is not mentioned by Glanvil or Bracton or by any register of writs of Henry III.'s day, but that in 1290 there is endorsed on a petition to Parliament of certain ancient demesne tenants a direction to make a writ for such cases "to endure for all time."

[4] Ibid 376, 377.

[5] Ibid 382-384; Vinogradoff 122-125.

[6] Dialogus de Scaccario i 10; Bracton f. 7.

[7] Vol. ii 72, 170, 201.

men should have survived on the king's manors while they disappeared elsewhere is perhaps not strange. Other lords got what they could out of the conquered population and, assisted by the royal courts, degraded them to the position of villeins. The king posed as the successor of Edward the Confessor. The new legal doctrines could not perhaps so easily be applied to his manors. In many ways they stood apart from the rest of the country because he was king. Even if he alienated his manor these peculiar characteristics remained, partly because it would not have been fair to existing tenants to allow such alienation to alter their rights;[1] partly because the king, if he ever resumed his grant, would not wish to see his property wasted and his tenants exiled;[2] partly because even after such alienation he often assumed to exercise some rights within the manor.[3]

In later days the existence of this tenure puzzled the lawyers. When tenure in villeinage had become tenure by copyhold, when copyholders had gained protection in the king's court,[4] the differences between ordinary copyhold tenure and tenure in ancient demesne became merely technical. The ease with which an act of the lord might convert the latter tenure into freehold[5] must have tended to reduce the amount of land held by it. In fact, in some cases the privileged tenant in ancient demesne found himself at a disadvantage as compared with the copyholder. The copyholder had a right of action in the king's court: the tenant in ancient demesne must sue in the lord's court, and could not make use of the new action of ejectment.[6]

The lawyers never quite made up their minds whether or no these tenants had the freehold. In the early years of the fifteenth century it was laid down that sokemen who use the little writ and convey their lands by feoffment are freeholders; while those who convey "by the rod" cannot use the little writ, and are therefore villeins or copyholders.[7] This seems to be the view taken by

[1] Vinogradoff, English Society 326, 330, 429, 474.

[2] P. and M. i 380; Vinogradoff, Villeinage 107; cp. Coke, Fourth Instit. 269—he says that they have their privileges "to the end that they might better apply themselves to their labours for the profit of the king."

[3] Vinogradoff 105-107.

[4] Above 206, 208-209.

[5] See Viner, Ab. *Ancient Demesne* I and K.

[6] Ibid E pl. 23; Coke, Fourth Instit. 270, says, "This privilege [of suing in the manor court] doth not extend to meer personal actions, as debt upon a lease, trespass, quare clausum fregit, and the like, in which by common intendment the title of the freehold shall not come in debate. But otherwise it is of all real actions, and also in actions of account, replevin, ejectione firmæ, writ of mesne, and the like, where by common intendment the realty shall come in question;" cp. Y.BB. 17, 18 Ed. III. (R.S.) 142; 18 Hy. VI. Mich. pl. 11.

[7] Y.B. 14 Hy. IV. Hil. pl. 51, *Hankford*, J., said, "Comment que vous avez use de porter bref de droit, etc. Et ce ad este malement use, et enconter ley, car jeo meme veye un foits ceo matter debate en Parliament, et la fuit determine que touts les terres que sont tenus par verge ne sont pledables par bref, mes par bill, per ce que

Fitzherbert,[1] and with respect to those who conveyed by feoffment, it is the view which has prevailed.[2] If it had prevailed at an earlier period, it might have taken their privileges from many tenants in ancient demesne. But, as Maitland points out, we hear of this doctrine at a time when it does not much matter to the tenant in ancient demesne whether or not he is entitled to the little writ, seeing that as a copyholder he was acquiring other and better remedies.[3] No doubt the fact that some lawyers adopted this doctrine was one reason why this class of tenants tended to decrease. But it was not, and it could not be, universally adopted. There were still tenants who used the little writ and yet conveyed by the rod, who held by the custom of the manor but not at the will of the lord. The rule laid down by Fitzherbert took no account of those who held in this manner. Some thought that they could be called freeholders,[4] while others denied them this title;[5] and it is the latter opinion which has prevailed.[6]

The difficulty was an old one. The same judge who laid it down that all who conveyed by the rod held by villein tenure seems to say in an earlier case of the same year that by special custom one who was seised of an estate of inheritance in the land might convey by surrender to his lord.[7] This case shows us that even in the mediæval period some confusion was caused by the fact that the term "freehold" was used sometimes to express the quality of the tenure, sometimes the quantity of the estate; and at a later period this was a still more fertile source of confusion.[8]

le franktenement est en le Seigneur. Et auxi il ad diversite parenter sokeman de franktenure et sokeman de base tenure; sokemen de franktenure sont ceux que demurrant en auncient demesne, queux sont pledable par brief de droit close; mes sokemen de base tenure sont ceux que teignont par verge al volunte le Seignior, et le franktenement est en le Seignior." This distinction does not seem to be insisted on in the Old Natura Brevium, cited Blackstone, op. cit. 126.

[1] F.N.B. 11 F, 12 B and C.

[2] Third Report of the Real Property Commission 12-14; Merttens v. Hill [1901] 1 Ch. 842; hence it was held in that case that no fine for alienation could be charged —a deduction clearly in harmony with the rules of the common law as to freedom of alienation, above 85; but cp. Professor Vinogradoff's criticism L.Q.R. xxx 499.

[3] Above 208-209.

[4] Bro., Ab. *Tenant per copie* pl. 22 (3 Ed. III.); Combe's Case (1614) 9 Rep. 76; Cro. Car. 229, "Though it be mentioned that the land is granted by copy it is not said *tenendum ad voluntatem domini;* so it may be well intended a freehold: and in Wales there be many freeholds granted by copy and by verge;" Co. Litt. 59b; Coke, Copyholds § 32; Gale v. Noble (1698) Carth. 432.

[5] Hunt v. Burn (1701) Salk. 57, Holt, C.J., said that tenants in ancient demesne were free as to their persons, but not as to their estates.

[6] Bishop of Winchester v. Knight (1717) 1 P. Wms. 406; Stephenson v. Hill (1762) 3 Burr. at p. 1278; Conolly v. Vernon (1804) 5 East 51; Cooke v. Danvers (1806) 7 East 299; Duke of Portland v. Hill (1866) L.R. 2 Eq. 765, 777.

[7] Y.B. 14 Hy. IV. Mich. pl. 2; cp. Bro., Ab. *Customes* pl. 2 = Y.B. 3 Hy. VI. Pasch. pl. 24—but in this case the tenants are said to be seised of "their tenancy," not as in the former case of "the inheritance."

[8] Duke of Portland v. Hill, above n. 6.

In fact, the question whether or not these tenants had the freehold might well have remained a moot point had not their right to the parliamentary franchise turned upon its solution. Blackstone considered the question, and came to the historically correct conclusion that these tenants were neither freeholders nor copyholders, but a *tertium quid*;[1] and his conclusion that they could not be said to have the freehold has, as we have seen, been adopted by the judges.[2] So far as it applied to the parliamentary franchise it was immediately adopted by the legislature.[3]

The peculiar form of the actions which were obligatory upon tenants in ancient demesne sometimes caused difficulties when these actions were used for the purpose of suffering a recovery or levying a fine. These difficulties were removed, and preceding irregularities so far as possible rectified, by the Act which abolished fines and recoveries. In consequence of the changes made by the Common Law Procedure Act, 1852, the peculiarities of this species of tenure have for the most part disappeared.[4]

The Borough Customs.[5]

There are two main causes for the divergence of the borough customs from the common law. (1) These customs were in many cases codified in the borough custumal at an early date.[6] Because they were thus stereotyped they were more able to resist the encroachments of the common law than the uncodified customs of the open country. Thus we find that in many cases they preserve old rules which elsewhere have passed away. (2) The borough was a commercial centre, and therefore landowning in the borough tended to diverge at many points from landowning in the country. The rules which suited the knight, the religious house, the serjeant, or the socman, and the manorial rules regulating the humbler classes which cultivate the soil, could not be transplanted in their entirety to the house and the shop of the burgess. No doubt the gulf between the dweller in the town and the dweller in the country was in some ways less deep in mediæval than in modern times; and there are boroughs and boroughs. Great cities like London or Bristol were more commercial and less agricultural than market towns like Oxford or Cambridge. Some boroughs owned many acres of common lands.[7] But, when all allowances have been made, it is obvious that the commerce of the boroughs necessitated some exceptions to the ordinary rules of the land law.

[1] Above 265. [2] Above 268. [3] 31 George II. c. 14.
[4] Williams, Real Property 57, 58; 3, 4 William IV. c. 74; 15, 16 Victoria c. 76.
[5] See Miss Bateson's Introduction to vol. ii of the Borough Customs (S.S.); M. W. Hemmeon, Burgage Tenure in Mediæval England, some parts of which will be found in L.Q.R. xxvi 215, 331, and xxvii 43.
[6] Vol. ii 373-375. [7] Vol. i 139.

I shall here very briefly mention a few of the special customs in the boroughs, and I shall group them under these two heads. Of course, it is not possible thus to group exactly the almost infinite variety of these customs. Some primitive rules may well have sprung up and survived from both these causes, but this will give us a rough principle of division between a somewhat chaotic mass of various rules.

(1) Rules arising from the fact that the borough customs were codified.

In some boroughs there are restraints upon alienation both in the interests of the lord and in the interests of the kin which take us back to the days of the Laws of Henry I. and of Glanvil.[1] The burgess had, at an early date, got his lord's leave to sell his houses on payment of a fixed price, and the obligation to pay that price remained even when freedom of alienation had become the general rule of the common law.[2] The kin had the right to hinder the alienation of land,[3] except in certain cases of necessity;[4] and their rights were greater in the case of inherited than in the case of purchased land.[5] In some cases, however, this right to hinder alienation had sunk to a right of pre-emption[6]—and, according to the custumals of some towns, at a price lower than that offered by the stranger purchaser.[7] In other cases if the kin did not exercise this right of pre-emption the lord could exercise it.[8] These restrictions, however, were modified by the very general rule that seisin for a year and a day gave the purchaser a good title.[9]

We have seen that in the thirteenth century the owner of land could impose restrictions upon its alienation to certain classes of persons, such, for instance, as Jews or religious houses.[10] These restrictions appear in many custumals.[11] No doubt they date back to the time when the law as to limitations on alienation

[1] Borough Customs (S.S.) ii lxxxv-xci; Hemmeon, op. cit. 52-54, 111, 115-126; above 73-75.

[2] Borough Customs ii 65 Northampton (fifteenth century); 70 Kidderminster (1333 ?); Hemmeon, op. cit. 54-58.

[3] Borough Customs (S.S.) ii 69 Bury (1327).

[4] Ibid 61 London (1133-1154); 63, 64 Northampton (1190).

[5] Ibid 69 Manchester (1301); 95, 96 and notes as to devise; cp. above 74.

[6] Ibid 69, 70.

[7] Ibid 70, 71 Fordwich (fourteenth century); 72 Dover (fifteenth century).

[8] Ibid 64, 65 Northampton (1190).

[9] Ibid ii cxv-cxvii; 62, 63 Nottingham Charter (1155-1165), "Et quicunque burgensium terram vicini sui emerit et possederit per annum integrum et diem unum, absque calumpnia parentum vendentis, si in Anglia fuerit, postea eam quiete possidebit."

[10] Above 103.

[11] Borough Customs ii xci; 93 Chard (1230); Waterford (1300) "except . . . to such people as cannot aid or succour the city if there be need;" Godmanchester (1324) not "to any foreigner."

was uncertain, but they were also regarded as useful by boroughs who desired to discourage foreigners.

Some of the rules of inheritance are old survivals. We know from Glanvil that one of the gifts which a landowner was allowed to make was the gift of a marriage portion to his daughter.[1] We see this permission in some of the custumals,[2] with the addition that the child to whom such an advance has been made is "forisfamiliated," i.e. she cannot claim any further share in the inheritance.[3] We see, too, that in the borough partibility of the inheritance was the rule, as it was the rule in Glanvil's time in the case of land held by non-military tenure.[4] But the number of variations upon this custom is great. Among these variations the best known is the custom of descent to the youngest son—the "borough English" of the common law. The name is derived from the fact that at Nottingham it was the custom of the English as contrasted with the French town.[5] It was, however, found at other places besides Nottingham, and it was known in manors as well as boroughs, both in England and abroad.[6] Probably its explanation is to be found in the fact that "the younger son, if he lack father and mother, because of his younger age, may least of all his brethren help himself."[7]

(2) Rules arising from the commercial character of the boroughs.

Of the special customs which may be ascribed to the commercial character of the boroughs the most striking is the custom to devise lands.[8] In its origin it may no doubt come down from the time when the common law had not as yet firmly set its face against the will of land.[9] But it cannot be doubted that its extension was an object of ambition to the boroughs, because the burgess regarded his house as part of his capital, and desired to have the same freedom of disposition over it as he had over his chattels.[10] Therefore, as Maitland has said, "it is in the boroughs that landownership first reaches a modern degree of purity and intensity."[11]

[1] Above 74.
[2] Borough Customs ii 92 Northampton (1190).
[3] Ibid 133 Ipswich (1291); and Exeter Court Roll (1321, 2); vol. ii 272, 579.
[4] Ibid 132, 133. [5] Ibid xcv. [6] Robinson, Gavelkind 238, 239.
[7] Litt. § 165; and cp. Robinson, Gavelkind 232-235; Littleton's explanation is that adopted in Y.B. 8 Ed. IV. Mich. pl. 30.
[8] For a general account see Hemmeon, op. cit. 130-144.
[9] Borough Customs ii xcii; we see in some places the distinction drawn between acquired and inherited land, e.g. 98 Norwich (1306).
[10] Ibid xciii, xciv; see ibid 96 London and Northampton (1295-1316), "Purchased lands which a man can devise like a chattel, and this because burgess merchants generally employ the half or more of their chattels in their housing, wherefore they may devise their purchased land, but not their inherited land."
[11] Township and Borough 72.

The maintenance in a proper state of repair of the buildings of the borough was necessary to the safety of the community. Thus there are stringent rules as to repair, and a peculiar procedure in case of waste.[1] In case of waste it was necessary to consider not only the interests of the community, but also the interests of the lord. The lord could not so easily seize a tenement in the borough as he could seize a tenement in one of his own manors if it were being wasted.[2] Therefore a special process in case of waste is developed earlier in the boroughs than at common law. For similar reasons, as we have seen, the royal remedy afforded by the writ of *cessavit* may have been suggested by some of the borough remedies for rent in arrear.[3] Conversely the interest of the tenant for term of years was sometimes better protected than at common law. The clause of the Statute of Gloucester[4] which allowed the termor to intervene in a collusive action arranged by his landlord to deprive him of his land may have been suggested by the needs of Londoners. At Dublin the termor had a right of pre-emption if his lessor proposed to sell or let the land.[5]

Escheat, usually to the crown, and forfeiture are found in the boroughs;[6] but there are very few of the other incidents of tenure. Reliefs are not found in the larger boroughs,[7] and heriots only in those which were purely agricultural.[8] No aids[9] are exacted, and the incident of marriage is unknown.[10] It is in respect to the incident of wardship that the greatest divergence is apparent; for it is clear that the claim of the lord to wardship is wholly incompatible with the interests of the burgesses. "In the smaller boroughs, under a single lordship, it was early made a clause of the borough charter that the lord should give up his right of wardship, and that the duty of guardianship should devolve in the last resort on the reeve or some person selected by the burgesses. There was to be a dative guardianship when the natural or testamentary guardianship failed, never any seignorial guardianship. The testamentary guardianship, of course unknown to early folk law, . . . seems to have become a borough privilege akin to the privilege of freedom of alienation or devise."[11] We are not surprised to find that the borough courts exercised a stringent control over the guardian's conduct.[12] They were com-

[1] Borough Customs i 278-280. [2] Ibid ii cxxv, cxxvi; ibid i 281-285.
[3] Above 16.
[4] 6 Edward I. c. 11—the statute applies primarily to the City of London; cp. Hemmeon, op. cit. 90.
[5] Borough Customs ii cxxvi; and cp. i 312, 313.
[6] Hemmeon, op. cit. 24, 45; it was said in argument in Y.B. 8 Ed. II. (S.S.) 73 that burgage tenure was always tenure in chief.
[7] Hemmeon, op. cit. 18-21. [8] Ibid 22.
[9] Ibid 11, 12. [10] Ibid 12, 15.
[11] Borough Customs ii cxxviii, cxxix; 145 seqq. [12] Ibid 148-153.

pelling him to account, before the common law had attained an adequate process for this purpose.[1] Their rules made the guardian a trustee, whose duties were minutely regulated.[2]

Such, then, are some of the principal variations of the borough customs from the common law relating to landholding. They have not been wholly uninfluenced by the common law, nor has the common law been wholly uninfluenced by them. We can trace the influence of the real actions given by the common law in many of the proceedings which could be taken for the recovery and protection of property in the borough courts, and in the estates for which such lands could be held.[3] On the other hand, the larger protection given by the common law to the termor, the effective remedy by writ of *cessavit* given to the landlord, the action of account given against the guardian in socage—if they were not actually suggested by the borough customs, at least were to be found existing there in principle before they became part of the common law. In the custom to devise land, and in the permission to appoint a guardian by will, we can see rules which the common law was slow to follow;[4] and in the strict control which the borough court exercised over the guardian we can see the development of a trusteeship to the conception of which the common law never attained. That it never attained to this conception is due in no small degree to the fact that it set its face against the devise of land, and to the fact that it had abandoned jurisdiction over wills of personalty to the ecclesiastical courts.[5] This will be apparent if we look at some of the cases in the Year Books which turn upon these devises in the boroughs. They show us that the germs of some legal doctrines, which grew in

[1] Borough Customs ii cxxxii.

[2] Ibid 147, 148, extracts from the White Book of London (1243) and from the coram rege roll Pasch. 3 Ed. II. r. 74 (no. 200) (1310); "From the end of the thirteenth century wardship had become in some of the boroughs a trust under the superintendence of the borough court," ibid cxxxiii; and cp. Williams, Executors (8th ed.) 1553-1554; Calendar of Wills in the Court of Husting xlvi, xlvii; Hobart's Rep. (1619) case 314; Lex Londiniensis, or City Law (ed. 1680), deals at pp. 55-99 with the Orphans' Court. The usefulness of the London court in looking after orphans' goods in the sixteenth century is illustrated by James Whitelocke's Liber Famelicus (C.S.) 6. But at the end of the seventeenth century the City of London found itself unable to meet its obligations to the orphans, Hist. MSS. Com. 13th Rep. App. Pt. V. no. 329; a bill was introduced into the House of Lords in 1690 which was dropped in the Commons, ibid; it was reintroduced in 1691, but rejected by the Commons, ibid no. 434; an Act was finally passed in 1694-1695, 6 William and Mary c. 10.

[3] Borough Customs ii cxix-cxxiv; at p. cxxiii it is said that, "The practitioners in the borough court imitated the procedure in the royal courts in dealing with the newer real actions by causing the demandant who brought a writ of right to protest that he would prosecute his action 'in the manner of' one of the common law actions." For the assize of fresh force, which apparently was at one time the possessory remedy for those who had land in boroughs having the franchise to hear pleas of land, see the Eyre of Kent (S.S.) iii xxxvi-xl.

[4] Guardianship 12 Charles II. c. 24 § 8; Wills 32 Henry VIII. c. 1.

[5] Vol. i 625-629; below 536, 585, 591-595.

later days to great importance under the fostering hand of the chancellor, might have been elaborated in the common law. In the bargain and sale by executors we see what is in substance a power of appointment.[1] In a case of Edward III.'s reign we see a future interest in land which is certainly not a remainder.[2] In fact, the attention paid to the intentions of the testator rather than to his exact words reminds us far more of later equitable doctrines than of any of the usual doctrines of the common law.[3] These instances may show us that if the common law had not set its face so rigidly against the devise of land many doctrines, which later were appropriated by and elaborated in the Chancery, might have come within its sphere of influence.

But the borough customs as to the land law were not destined to exercise any of these large liberalizing influences. They gradually disappeared—absorbed into the general system of English law; and they left their traces only in isolated rules of which the law must still make mention as exceptions to its uniformity.

It is not to the land law that we must look for any important influence of the borough customs on the common law. In the boroughs the land law was not, even in the Middle Ages, the most important branch of the law. It is rather to the rules regulating commercial transactions, and more especially to the rules which regulate foreign trade, that we must look for the sources of more permanent and important influences.[4] But though the borough customs cannot be said to have exercised a great influence upon the development of the law, they are of great importance to those who study its history, because they throw light upon many early phases and upon many of those old rules which formed the raw material of its founders. Upon this aspect of their importance we cannot do better than copy the eloquent words of Miss Bateson—the learned and lamented historian who has given us back again our borough law:—[5]

"For the sake of uniformity of worship, many quaint rites have been abandoned; in the great temple of the common law the side chapels are altarless and empty. The justice of the local

[1] Y.B. 19 Hy. VI. Mich. pl. 47, *Markham* says, "Et, Sir, jeo veux prover bien que l'executors peuvent donner choses qu'ils n'avoient, et en ceo sont semble a un whetstone que don sharpness a un cottel, et uncore nul est en luy;" above 136-137.

[2] Above 136.

[3] Y.B. 22 Ed. III. Mich. pl. 59 it was argued that a devise without words of limitation passed the fee simple; this was not acceded to; Fitzherbert abridges this case twice, *Devise* pl. 11 and 20; pl. 11 follows the Y.B.; but pl. 20 (perhaps from another MS.) adds, "mes si soit a avoir a luy imperpetuum mesque nul mencion soit fait de ses heires uncor il avera fee, mesne la ley est d'un devise fait a un home et assignatis suis."

[4] Vol. i 543-544, 569, 570-573; vol. ii 309-310, 592; Bk. iv Pt. I c. 3.

[5] Borough Customs ii clvi.

courts has been ruthlessly condemned as incompetent, provincial, archaic, unprogressive, unable to adapt itself to a new state of society. The old local justice is 'antiquity forgot, custom not known,' because in the system of national justice the general destroyed the particular, no doubt for good reason. And yet for the true understanding of the 'jus et consuetudo regni,' founded on a bedrock of unwritten tradition, on general immemorial custom, it may be well to stoop to examine the unworthy particulars. In borough custom we have a neglected series of rocks, not primary in antiquity, but full of the signs of life, and the extinct forms which it permits us to handle have a place in the history of the making of the common law.'"

CHAPTER II

CRIME AND TORT

IT is in this period that the foundations of our present law as to Wrongs criminal and civil are laid. I have already indicated some of its salient features. The crown has assumed jurisdiction over the more serious crimes—the felonies. Treason has been made the subject of a special statute and has been differentiated from the other felonies. For offences under the degree of felony there is the writ of trespass, which has, as we have seen, both a criminal and a civil aspect.[1] Such offences when criminally prosecuted will become the misdemeanours of our later law. At the beginning of this period many of the smaller wrongs to person and property were dealt with in the local courts. At the end of this period the writs of trespass and deceit and their offshoots enabled the royal courts to offer better remedies for a varied and growing class of wrongs. Consequently new principles both of criminal and civil liability were being evolved.

The history of the criminal law of the fourteenth and fifteenth centuries is in the main the history of the detailed working out of the principles which had been laid down in the reign of Edward I. If we except the statute of Edward III. relating to treason, we find no great fundamental changes made by the legislature. We see, it is true, the beginnings of the criminal law as to labour and vagrants,[2] and some small attempts to prevent offences which may injure the state in its relations with foreign states.[3] But these branches of law do not attain any great importance in this period. The Statute of Præmunire and the legislation on the subject of heresy I have already dealt with.[4] As we have seen, most of the statutes of this period which create new criminal offences have no great permanent importance in the history of the criminal law.[5] It was not till the state renewed its vigour in the following period that we get either in the statutes or in decided cases any great developments. For the present the criminal law is cumbered with decadent survivals. Appeals of felony, approvers, benefit of clergy, sanctuary, abjuration, deodands,—

[1] Vol. ii 357-365, 449-450. [2] Ibid 459-464. [3] Ibid 473-474.
[4] Vol. i 585-586, 617. [5] Vol. ii 449-453.

raise many intricate questions; and the intricacies of process hamper the due administration of the criminal law almost as much as they hamper the administration of the civil law. The king's rights to escheats and forfeitures and the chattels of felons seem sometimes to interest the judges almost as much as the due maintenance of law and order. Nor were the common law judges aroused to greater activity by the existence of the competition of a rival court. We have seen that Parliament had set its face against any interference with the common law in matters of life and limb;[1] and though the jurisdiction of the council was exercised, and sometimes even recognized by the legislature, the weakness of the central government prevented the fear of its competition from exercising a liberalizing influence upon the doctrines of the common law.[2] Moreover, at all periods of our history it has been far more difficult to extend the criminal law by a process of judicial decision than any other branch of the law. There has always been a wholesome dread of enlarging its boundaries by anything short of an Act of the legislature. The fate of Richard II.'s judges, who tried prematurely to invent a doctrine of constructive treason, was somewhat of an object-lesson to the judges of this period;[3] and for many centuries to come the fear of an impeachment held in check even judges of pronounced absolutist tendencies. Thus it has happened that the criminal law has, more than any other branch of the law, been developed by statutes. But those statutes have been interpreted in the light of doctrines which were elaborated in the Middle Ages; and though the statutes have enlarged the boundaries of the criminal law they took away no one of those half obsolete rules and practices which were cumbering the law in this period. Thus it happened that, till the beginning of the last century, there were probably more archaic survivals both in the substantive and adjective parts of the criminal law than in any other part of the law of England.[4]

The law of tort in this period shows far more progress. This was partly due to the fact that in the writs of trespass and deceit on the case the law had gained forms of action which facilitated development. Partly also it was due to the fact that in giving new civil remedies for admitted wrongs the courts were not hampered by the dread that they were incurring unpopularity by infringing the liberty of the subject—on the contrary, they probably added to the popularity of the common law by thus increasing its efficiency. But above all the courts were met at

[1] Vol. i 486-488. [2] Ibid 489-491. [3] Vol. ii 560; below 291-292.
[4] Obvious illustrations are trial by battle, peine forte et dure, deodands, pardons of course, benefit of clergy.

the end of this period by the competition of the Chancery; and, as we have seen, there was every reason to fear that if they sent empty away suitors who complained of obvious wrongs, those suitors would betake themselves to the rival jurisdiction.[1]

I shall deal with the history of the more salient features of this branch of the law in the following order:—§ 1. Self-help; § 2. Treason; § 3. Benefit of Clergy, and Sanctuary and Abjuration; § 4. Principal and Accessory; § 5. Offences against the Person; § 6. Possession and Ownership of Chattels; § 7. Wrongs to Property; § 8. The Principles of Liability; § 9. Lines of future Development.

§ 1. Self-help

The first business of the law, and more especially of the law of crime and tort, is to suppress self-help. And so we find that the further back we go into the history of law the more frequent and detailed are the prohibitions against asserting one's rights by force. The law cannot safely allow many exceptions to its general prohibitions, for that would be to weaken the force of a general rule, obedience to which is a condition precedent to its life.[2] It is only when obedience to law has become the rule that the occasions upon which self-help will be allowed can be safely defined. At the beginning of this period we are still in the state of society when the general rule needs to be firmly enforced. At the end of this period the common law had acquired a large number of rules upon this matter, and, in the Year Books, a still larger number of concrete instances of the manner of their application. There were in fact several reasons why the question whether a litigant's self-help was or was not justifiable had become important. We have seen that the weakness of the executive had led to a recrudescence of feudal disorder.[3] We have seen, too, that, alterations in the law, which extended a disseised owner's right of entry, gave opportunities for forms of disorderly self-help which had been sternly prohibited in the thirteenth century.[4] For these reasons we begin to see some of the leading principles of the law relating to the conditions under which self-help is permitted.

In defence of personal freedom a man imprisoned by another in his house was allowed to break open the house to effect an escape;[5] and we shall see that the conditions under which corporal

[1] Vol. ii 592-593; below 424, 436, 442, 447.
[2] Vol. ii 44.
[3] Ibid 414-418.
[4] Ibid 263, 583-586; cp. P. and M. ii 572.
[5] Y.B. 9 Ed. IV. Mich. pl. 10 *per* Littleton.

injuries to another, in defence of a man's person, or that of his servants or family, were justifiable, were growing more precise.[1] Similarly we see some attempts at defining the conditions under which a man was allowed to help himself if his rights to the quiet enjoyment of his property were attacked.[2] An illustration of the right to help oneself in these cases is afforded by the remedy of abatement. A man was allowed to enter premises where a nuisance exists and abate it, if the nuisance rendered his land unprofitable or his house uninhabitable.[3] Also, within certain limits, an owner, if deprived of his goods, might recapture them, or if disseised of his land might peaceably enter thereon; and in the case of these rights of recapture or re-entry the conditions under which they were permissible were somewhat more liberal at the end of this period than they were at the beginning; and they tended to become still more liberal in modern law.[4] Of this development in the law I must at this point speak briefly.

In the case of goods, the man who retook them by force committed a trespass, and in the thirteenth century ran considerable risks of being treated as a thief.[5] At the end of this period the use of force was probably tortious,[6] and might, if it resulted in the death of the person against whom it had been used, be felonious;[7] but, of course, if the person wrongfully in possession used violence to defend that possession, the violence of the rightful owner might be justifiable if it could be proved that it was used in the necessary defence of his person.[8] On the other hand, peaceable recapture was allowed; and it was lawful for this purpose to enter upon the land of the person who had wrongfully taken the goods, but not to break into his house.[9] But such entry was not permissible if the true owner had bailed them to the person on whose land they were; nor (probably) if the person who had wrongfully taken the goods had sold or bailed them to

[1] Below 312-314, 377-378.

[2] Below 378; Coke lays it down, Second Instit. 316, that a man may justify an assault and battery in defence of lands or goods, but not maiming or wounding or menace of life or member—" and so note a diversity between the defence of his person, and the defence of his possessions or goods; " Green v. Goddard (1704 *circ.*) 2 Salk. 641 *per* Powell, J.

[3] Bracton f. 231b—but in his day only if the nuisance was recent; Y.BB. 20, 21 Ed. I. (R.S.) 462; 9 Ed. IV. Mich. pl. 10 *per* Littleton. As yet the limits of the right to abate are not very clearly defined; the process of limiting this right till it becomes a remedy of very exceptional character has not gone very far in this period.

[4] L.Q.R. xxviii 275.

[5] Britton i 57, 116; cp. Pollock, Torts (5th ed.) 362 n. x; below 284 n. 6, 320.

[6] See Y.B. 35 Hy. VI. Mich. pl. 3 *per* Prisot, C.J.

[7] Below 312.

[8] Y.BB. 22 Hy. VI. Mich. pl. 12 (p. 8) *per* Pole, *arg.*; 35 Hy. VI. Mich. pl. 3; 9 Ed. IV. Mich. pl. 10.

[9] Y.BB. 9 Ed. IV. Mich. pl. 10; 21 Hy. VII. Hil. pl. 18.

another and they were on that other's land,[1] unless the wrongful taking amounted to larceny.[2] But in the case of goods we must always remember that, if the goods had been taken under such circumstances as amounted to a felony, and the thief had been convicted, the right of recapture was subject to the crown's right to have these goods as a forfeiture. It was only under special circumstances that the rights of the true owner overrode the rights of the crown.[3]

In the case of land the disseised owner could, even in the thirteenth century, re-enter, if he did so at once, i.e. within some four or five days.[4] But we have seen that this right of re-entry had been largely extended at the end of this period.[5] There could be no larceny of land; so that the right to re-enter was not limited, as in the case of goods, by the paramount claims of the crown. It was found that the law allowed disseised owners too large a licence for the due maintenance of the peace. Therefore the statutes of forcible entries made forcible entry a criminal offence.[6] The question of the effect of these statutes upon the right of an owner, who having a right of entry, makes a forcible entry upon his property, has long been an unsettled question. There is clear Year Book authority to the effect that these statutes give only a criminal remedy, and that, as they do not affect the civil remedies of the parties, a person who thus enters gets legal possession.[7] It follows that, as the person thus in possession is entitled, the person ousted cannot get restored to possession or recover damages for the loss of possession. Though there was weighty authority to the contrary,[8] this would seem to be right in principle, and has recently been decided to be the better opinion.[9]

[1] Higgins v. Andrews (1619) 2 Rolle. Rep. 55; Bl. Comm. iii 5.

[2] Ibid.

[3] Vol. ii 361; below 329-331. After 21 Henry VIII. c. 11, which introduced the writ of restitution after the thief had been convicted on indictment, it was ruled that recapture was lawful in cases where the writ of restitution was obtainable, Hale, P.C. i 546. The man who, knowing of the felony, "taketh of the thief his goods again, or amends for the same to favour or maintain him, that is not to prosecute him," Coke, Third Instit. 134, is guilty of theft bote; cp. Stephen, H.C.L. i 502.

[4] Vol. ii 263; cp. Y.B. 3 Ed. II. (S.S.) 192.

[5] Above 278.

[6] Vol. ii 453; in Y.B. 21, 22 Ed. I. (R.S.) 556 Hyham, *arg.*, says, "I may enter my own land with all manner of arms if I please; for I am doing no trespass."

[7] "On aura action sur le Statute quand on entre l'ou son entre n'est congeable sans parler de fort main s'il veut, *Quod fuit concessum.* Mes on n'aura accion quand il est ouste ove fort main per un autre quand son entre fuit congeable, pur ce que pur le fort main le party convict sera fine au Roy . . . *Quod fuit concessum per touts*," Y.B. 9 Hy. VI. Trin. pl. 12; to the same effect Y.B. 15 Hy. VII. Hil. pl. 12.

[8] Newton v. Harland (1840) 1 M. and G. 644; Beddall v. Maitland (1881) 17 C.D. 174; Edwick v. Hawkes (1881) 18 C.D. 199.

[9] Hemmings v. Stoke Poges Golf Club [1920] 1 K.B. 720, over-ruling the cases cited in n. 8; Harvey v. Brydges (1845) 14 M. and W. 437; Clark and Lindsell, Torts (4th ed.) 334-335.

The oldest form of self-help is the process of distraint. The essence of distraint is, as Blackstone[1] puts it, "the taking of a personal chattel out of the possession of the wrongdoer into the custody of the party injured, to procure a satisfaction for the wrong committed." This expedient is at once ancient, common, and, in early law, used for a variety of different purposes.[2] It is so useful that it has maintained its place even in mature legal systems; but it has only maintained its place because it has been minutely regulated. In consequence of this regulation it has almost ceased to be a form of self-help, and has risen, even as in Roman law the Legis Actiones *per manus injectionem* and *per pignoris capionem* rose,[3] to the dignity of a regular legal process. It is from this point of view that it differs from the forms of self-help which have just been discussed. They are forms of self-help pure and simple, deliberately allowed by a settled system of law as just and reasonable: distraint is a particular form of self-help which has survived from the time when the coercive force of law was weak, because it has been broken in to the service of the law and become a useful part of legal process. But though the law made use of distraint as part of its process to enforce appearance,[4] and sometimes as a mode of enforcing obedience to the orders of its courts,[5] there are still surviving some forms of it which recall the days when it was the remedy of the private person —when it was a form of self-help pure and simple. It is with these forms that I must here deal.

The two forms of this kind of distraint which have survived in the common law are (1) distraint damage feasant, and (2) the landlord's right to distrain for rent or other services in arrear.

(1) The person who finds beasts on his land doing damage may keep them or impound them till their owner pays for the damage which they have caused.[6]

(2) The second form—the landlord's right to distrain—is by far the most important of the two. It may be, indeed, that this right of the landlord was not originally a true case of self-help; for it may be a survival from the days when lords of tenants kept a court for those tenants, and distrained by the judgment of that court,[7] just as in much later days the court

[1] Comm. iii 6.
[2] P. and M. ii 573.
[3] Moyle, Justinian 644.
[4] Below 626, 675.
[5] In the case of the sheriff's tourn or the court leet certain fines or amercements might be recovered by distress, "in the nature of an execution," Gilbert, Distresses (ed. 1780) 12-15.
[6] Y.BB. 20, 21 Ed. I. (R.S.) 76, 78; 32, 33 Ed. I. (R.S.) 133.
[7] Cp. Bracton f. 157b, "Cum vero uterque præsens fuerit in comitatu, tunc dicat captor quod juste cepit et *per considerationem curiæ suæ*, pro servitio, quod idem querens et tenens suus ei debuit et ei injuste detinuit, et *inde poterit vocare curiam suam ad warrantum* si voluerit;" P. and M. ii 574.

leet distrained for the amercements inflicted by it. However that may be, the right continued to be the right of the landlord after he had ceased to possess or hold a court. It became so distinct from the right to hold a court that, though it belonged to the landlord *qua* landlord, it was denied to the court baron.[1] As happened in other cases, what had at first been the right of lords high in the feudal scale became the right of all landlords. Thus it comes to be merely an incident of the relationship of landlord and tenant, and so much a part merely of property law that it can be given in certain cases by the agreement of the parties, though no tenure exists between them.[2] Having been tried, and found an efficient remedy, it has been used, extended, and improved by the legislature.[3]

We may regard, then, the landlord's right to distrain as a true case of self-help. But because it is a case of self-help, and a form of it which can be easily used to compel almost any kind of performance or even to gratify spite, the law has found it very necessary to watch jealously its exercise and to regulate the conditions under which it will be allowed. When order was restored after the Barons' War, one of the first things to be regulated by the Statute of Marlborough (1267) were various unlawful uses which had been made of the practice of distraint.[4] It is because distraint was the ready weapon of the lord who wished to usurp jurisdiction and political power over his land that the breach of these rules was regarded as an offence of the most serious character.[5] The lord who takes distresses and declines to give them up, after the person distrained has offered security to appear and contest the lord's claim in an action, has committed the offence of *Vetitum namii*—

[1] Gilbert, Distresses 15, 16.

[2] In the case of a rent charge, above 151.

[3] Cp. Bl. Comm. iii 7, "For several duties and penalties inflicted by special Acts of Parliament (as for assessments made by commissioners of sewers or for the relief of the poor) remedy by distress and sale is given;" in earlier days it was the usual process by which local courts enforced penalties for breach of their by-laws, vol. ii 378; for the later law as to distresses for breach of such by-laws see Gilbert, Distresses 23, 24.

[4] 52 Henry III. cc. 1-4, 15, 21; the first clause tells us that, "Tempore turbationis nuper in regno . . . multi magnates et alii . . . de vicinis suis et aliis per seipsos graves ultiones fecerunt, et districtiones, quousque redempciones receperint ad voluntatem suam. Et præterea quidam eorum se per ministros Domini Regis justiciari non permittunt, nec sustineant quod per ipsos liberentur districtiones, quas auctoritate propria fecerint ad voluntatem suam."

[5] Thus in the Eyre of Kent the justices were directed to enquire of "great men and their bailiffs, and others, the king's officers only excepted, unto whom special authority is given, which at the complaint of some, or by their own authority have attached others, or their goods, passing through their jurisdiction, compelling them to answer afore them upon contracts, covenants and trespasses, done out of their power and their jurisdiction, where indeed such hold nothing of them, nor be within their franchise," the Eyre of Kent (S.S.) i 45 art. 135.

an offence which Bracton tells us is a form of robbery, and an even greater offence against the king's peace than disseisin.[1] Thus it was necessary to make the rules which regulated the taking of distresses so severe that even a small neglect of them exposed the lord to a heavy liability which was analogous to that of a trespasser or a disseisor.[2] It is for the same reason that the law has always sternly adhered to the view that the things distrained are merely pledges taken to compel the tenant to satisfy the landlord's claims, and that they must, therefore, be restored when the claim is satisfied. They are in the custody of the law; and the landlord gains no possession of them by the taking.[3] Hence neither trespass [4] nor novel disseisin [5] lay originally against a person who wrongfully distrained. To meet the case of a wrongful distraint the law provided the special remedy of replevin; and this action became not only the usual action in which to settle disputes between landlord and tenant, but also a means by which chattels which had been seized (even though not seized in the supposed exercise of a right to distrain) could be recovered. The history of this action shows us very clearly the manner in which a right of self-help has been so controlled that it has become simply a peculiar form in which legal proceedings may be initiated.

Probably from the time of Glanvil,[6] and certainly from the end of the twelfth or the beginning of the thirteenth century,[7] the plea *de vetito namio*—the proceeding which came to be known as the action of replevin—was a recognized plea of the

[1] f. 157b; P. and M. ii 575.

[2] Bracton f. 217, cited P. and M. ii 575; Y.B. 3, 4 Ed. II. (S.S.) 195-196 *Bereford*, C.J., considered that, replevin being similar to trespass, the process should be *capias*—"were it not every rascal in the country might take his neighbours' beasts . . . and go fleeing from place to place;" Bl. Comm. iii 14, 15, "I must observe that the many particulars which attend the taking of a distress, used formerly to make it a hazardous kind of proceeding; for, if any one irregularity was committed, it vitiated the whole, and made the distrainors trespassers *ab initio*;" for the rules as to the things privileged from distress (some of which are very old, P. and M. ii 575), see Gilbert, Distresses 25-39; Bl. Comm. iii 7-10.

[3] P. and M. ii 574; Y.B. 12 Rich. II. 4 *per* Pynchbek, C.B.; Bl. Comm. iii 10, 13; H.L.R. iii 31. He could not sell the goods till 1659, Pollock, Land Laws, 141.

[4] Ames, Lectures on Legal History 60 n. 2, citing Plac. Abbrev. 265 col. 2 (32 Ed. I.); for the later change in the law on this point see below 285. Coke's view, Second Instit. 105, which is supported by the Y.BB., see H.L.R. xxix 390, was that trespass originally lay against a lord for an unlawful distress, but that it was superseded by the remedy provided by the Statute of Marlborough c. 3; the date at which trespass became a common remedy (vol. ii 364) somewhat militates against this view.

[5] The Eyre of Kent (S.S.) iii 99-102; but see Britton i 281.

[6] xii c. 12.

[7] The plea de vetito namio is said to date from John's reign in Y.B. 30-31 Ed. I. (R.S.) 222, see P. and M. ii 576 n. 2; and cp. Maitland, Forms of Action 342. Possibly it did not exist as a plea of the crown *eo nomine* in Henry II.'s reign.

crown.[1] No doubt it became a plea of the crown because the irregular taking of distresses was a particularly dangerous practice from the point of view of royal justice. It was not only an excuse for all kinds of oppression,[2] it was also, as we have seen, an easy and obvious mode of establishing some sort of feudal jurisdiction. In Edward I.'s reign, however, royal justice had got the upper hand; and we can see from the clauses of the Statute of Westminster II. that the action has come to be chiefly a means of settling differences between landlord and tenant.[3] The ordinary course of the action was as follows:[4] The sheriff, on application being made to him by the distrainee, replevies the goods, i.e. redelivers them to the distrainee, upon his giving security to prosecute his action and to return the things distrained if he loses his action. If the sheriff could not replevy the property distrained because it had been eloigned (removed) by the distrainor, the distrainee could get a writ of Withernam directing the sheriff to take an equal amount of the distrainor's property, and to keep it till the distrainor restored the property which he had taken.[5] The distrainor could always stop the action of replevin by claiming to be the owner of the goods;[6] and as this claim was often made merely to delay the proceedings, the writ *de proprietate probanda* was devised early in the fourteenth century which enabled the sheriff to determine summarily the question of ownership.[7] If the question of ownership was determined against the distrainor the goods were delivered back to the distrainee. The latter then brought his action of replevin against the former. The former defended it by "avowing," i.e. by pleading the circumstances which showed that he had the right to distrain. If he succeeded the court awarded "a

[1] This is strongly asserted by Bracton f. 155b, "Detentio namii pro districtione facienda pertinet ad coronam domini regis et vix conceditur alicui terminandum præterquam ipsi domino regi vel justitiariis suis;" the sheriff holds this plea as a royal justice.

[2] For illustrations see H. E. Cam, Vinogradoff, Oxford Studies vi, xi 163-165.

[3] 13 Edward I. st. 1 c. 2.

[4] Bl. Comm. iii 147-150.

[5] F.N.B. 157 G, 158 A, B; cp. Bl. Comm. iii 148, 149 for the tale of how Sir Thomas More puzzled the omniscient German who offered to dispute concerning "de omni scibili et de quolibet ente" by the question, "utrum averia carucæ capta in withernamio sint irreplegibilia."

[6] Y.B. 32, 33 Ed. I. (R.S.) 54; though possibly there was some risk that an unfounded claim of ownership might be met by an appeal of larceny, Y.B. 21, 22 Ed. I. (R.S.) 106.

[7] Ames, Lectures in Legal History 68, thought that the earliest reference to the writ was in 1357, citing Fitz., Ab. *Prop. Prob.* pl. 3; but as Mr. Bordwell points out, H.L.R. xxix 376, there is a reference to the writ in 1326, Fitz., Ab. *Replevin* pl. 26; a case in the Eyre of Kent of 1313-1314 (the Eyre of Kent (S.S.) iii 197-198), which seems to contemplate the issue of such a writ, puts its date back still further; the writ is not mentioned eo nomine, but the procedure outlined seems similar to the procedure on such a writ as described by Fitz., Ab. *Prop. Prob.* pl. 4.

return," i.e. ordered the goods distrained to be restored to him. If he failed he must pay damages for a wrongful distress.

We have seen that at the end of the thirteenth century the spheres of trespass and replevin were distinct.[1] But before the end of the mediæval period the action of trespass was allowed to be used as an alternative to replevin.[2] This result had been gradually attained during the course of the fourteenth and fifteenth centuries. It seems to have been admitted that this was possible in 1312-1313;[3] but in 1342-1343[4] the question was treated as doubtful; and in 1345[5] the practice of the King's Bench and Common Pleas was said to differ upon the question. In 1406[6] Gascoigne, C.J., ruled that the plaintiff could elect which form of action he would use; and in 1441[7] Newton stated the law as finally settled as follows: "If you should have taken my cattle I can elect to sue by way of replevin which proves that the property is in me, or to sue by writ of trespass which proves that the property is in the taker." Conversely replevin was allowed to be brought instead of trespass *de bonis asportatis*.[8] But in practice a form of trespass was generally used instead of replevin; and the fact that replevin might be used instead of trespass was almost forgotten till the old learning was recalled by some cases decided in the earlier half of the nineteenth century.[9]

At the latter part of the sixteenth and in the seventeenth and eighteenth centuries the spheres of replevin and trover began to overlap. There are several cases at the end of the sixteenth and the beginning of the seventeenth centuries in which trover was brought by a plaintiff whose goods had been distrained. They were all decided on points of pleading in favour of the plaintiff for reasons which show that it was difficult to plead

[1] Above 283.

[2] H.L.R. iii 31-33, Essays A.A.L.H. iii 553 and cases there cited.

[3] Y.B. 6 Ed. II. (S.S.) 147 *per* Bereford, C.J.

[4] Y.B. 17 Ed. III. (R.S.) 96-98.

[5] Y.B. 19 Ed. III. (R.S.) 476.

[6] Y.B. 7 Hy. IV. Mich. pl. 5 (p. 28).

[7] "Si vous eussiez pris mes averia est en ma volonte a suer replevin que prouve que le propriete est en moy, ou a suer breve de trespass que prove que le propriete est en celui qui prist," Y.B. 19 Hy. VI. Pasch. pl. 5.

[8] Vol. ii 455 n. 1; cp. 6 Ed. II. (S.S.) 143, 148, 149 *per* Bereford, C.J.; Y.B. 6 Hy. VII. Mich. pl. 4 (p. 8) *per* Vavisor; H.L.R. xi. 374-375, Essays A.A.L.H. iii 428, 431-432.

[9] Shannon v. Shannon (1804) 1 Sch. and Lef. 327; George v. Chambers (1843) 11 M. and W. *per* Parke, B., at p. 159; H.L.R. xi 375, Essays A.A.L.H. iii 431-432; and cp. H.L.R. iii 31, Essays A.A.L.H. iii 553. Even Blackstone (Comm. iii. 146) seems to have thought that it only lay for a distrainee; but as Ames points out (H.L.R. xi 375) there is a clear case against this view in 1608, Godbolt 150 pl. 195; cp. Comyn, Digest, *Replevin* A; Gilbert, Distress (4th ed.) 80; 1 Co. Rep. 54a note, where it is said that, "a replevin is a remedy which lies to recover damages for an immediate wrong without force, in taking and detaining cattle and goods whether by distress for rent damage feasant etc. *or otherwise*."

a distraint duly effected as a defence to such an action.[1] In 1600 there is a dictum that trover or replevin will lie against a trespasser who has taken goods;[2] and in 1611 it was assumed that trover would lie for a wrongful distress.[3] This was finally decided to be good law by Lord Mansfield in 1770;[4] and so, as Ames has pointed out,[5] and as the cases recognize,[6] we get a doctrine applied to the taking of chattels somewhat like the doctrine of disseisin at election as applied to land.[7] For, as we have seen, the plaintiff, if he brought replevin, elected to consider himself still possessed, while, if he brought trespass or trover, he elected to consider that he was dispossessed. Conversely replevin could in some cases be brought instead of trover—indeed, Lord Ellenborough once ruled that if a plaintiff wanted the return of his chattel in specie replevin was the more appropriate remedy, for by bringing trover only damages could be got.[8] But trover and replevin never became so completely convertible as replevin and trespass. In one respect perhaps the scope of replevin was, till 1770, wider than that of trover; for at least two cases recognized (and on principle rightly recognized) that it was not every case of wrongful distress which would support an action of trover.[9] But in most respects trover was much wider

[1] Dee v. Bacon (1595) Cro. Eliza. 435; Salter v. Butler Noy 46-47; Agars v. Lisle (1614) Hutton 10.

[2] Bishop v. Viscountess Montague (1600) Cro. Eliza. 824, S.C. Cro. Jac. 50.

[3] Kenicot v. Bogan (1611) Yelv. 198, at p. 200.

[4] Tinkler v. Poole (1770) 5 Burr. 2657.

[5] Essays A.A.L.H. iii 553.

[6] Above n. 1; Y.B. 6 Hy. VII. Mich. pl. 4 (at p. 8) Vavisor says, "Il poit estre hors del properte s'il voile; come on poit estre disseisi de rents, s'il voile per porter del Assise mes ceo est a son volunte. Et issint est des biens prises, on poit devester le properte hors de luy, s'il voile, per proces de action de Trespass, on demander properte per Replevin ou brief de detinue, et issint doncque s'il soit a son pleasure;" so in Bishop v. Viscountess Montague (1600) Cro. Eliza. 824 it was said, "Although Trespass lies yet he may have this action (Trover) if he will, for he hath his election to bring either. And as he may have detinue or replevin for goods taken by a trespass, which affirms always property in him at his election, so he may have this action;" cp. H.L.R. xxix 386.

[7] For the doctrine of disseisin at election see Bk. iv. Pt. II. c. 1 § 2.

[8] Dore v. Wilkinson (1817) 2 Starkie 288.

[9] Mires v. Solebay (1677) 2 Mod. at p. 244; Etriche v. An Officer of the Revenue (1720) Bunbury 67; S.C. sub. nom. Israel v. Etheridge (1721) ibid 80; the latter case was characterized as "a very loose note" by Lord Mansfield, and overruled by him in Tinkler v. Poole (1770) 5 Burr. 2657, and the former case was not cited; but Lord Kenyon in Shipwick v. Blanchard (1795) 6 T.R. 298, though he had some doubts as to whether Trover ought to lie in these cases, followed Tinkler v. Poole; in Clowes v. Hughes (1870) L.R. 5 Exch. 160 no objection was taken to the form of the action. The law therefore is settled, but it is not generally the case that the taking of a distress is a conversion; the court truly said in Mires v. Solebay, "the defendant could be guilty of no conversion, unless the driving the cattle by virtue of the replevin would make him guilty; but at that time the sheep were *in custodia legis* and the law did then preserve them so that no property can be changed; and if so, there could be no conversion;" and Holt, C.J., seems to have been of the same opinion, since he said by way of dictum in Hartfort v. Jones (1699) 1 Ld. Raym. 393, "Though the detainer [by a person entitled to a lien] be lawful yet it does not amount

than replevin. Replevin would lie only against a defendant who had taken the goods, and not against a bailee or other person to whom the taker had conveyed them.[1]

But we must return from this digression into the law of property to the law of crime and tort.

§ 2. Treason

I have already said something of the main outlines of the law of treason during this period. We have seen that it attained to a statutory definition in 1352—at an earlier period than any other criminal offence—by reason both of its political importance and of its importance in the land law;[2] and the fact that it was defined thus early caused many archaic traits to be preserved in the statute.[3] The fact that the statute itself was a limiting and defining statute, if it has caused its provisions to be often neglected in times of excitement, has caused also a constant tendency all through our legal history to revert to its provisions in quieter times. It is chiefly for this cause that it is still the foundation of the law of treason. In this section I shall endeavour to give a brief account of (1) some of the earlier ideas upon the subject of treason which we see embodied in the statute, and (2) the mode in which the statute was applied in this period.

(1) The earlier ideas.[4]

In the provisions of Edward III.'s statute we can see at least four distinct ideas which have gone to make up the offence of treason: (*a*) the idea of treachery; (*b*) the idea of a breach of the feudal bond; (*c*) the idea that the duty to king as king is higher than the feudal duty to a lord; (*d*) an admixture of ideas taken from the Roman law of *læsa majestas*.

(*a*) The idea that treachery is a peculiarly heinous offence appears as far back as Alfred's law; and it was perhaps helped by the recollection that it was the sin of Judas Iscariot.[5] The idea survived in the fact that an indictment for treason always

to a conversion, *no more than a distress for rent;*" for as Rolfe, B., said in Fouldes v. Willoughby (1841) 8 M. and W. at p. 550, "in every case of trover there must be a taking with the intent of exercising over the chattel an ownership inconsistent with the real owner's right of possession."

[1] Mennie v. Blake (1856) 6 E. and B. 842; at pp. 847-849 the court seemed rather to agree with Blackstone's view (above 285 n. 9) but this was only a dictum; the decision was that "replevin was not maintainable unless in a case in which there has been first a taking out of the possession of the owner;" cp. Bishop v. Viscountess Montague (1600) Cro. Eliza. 824.

[2] Vol. ii 449-450.

[3] For a summary of the statute see vol. ii 449 n. 7.

[4] For the best account of these ideas see P. and M. ii 501-507; for the general history Hale, P.C., i 87-252; Stephen, H.C.L. ii 248-297.

[5] Vol. ii 48.

contained the words "*proditorie*," and "*contra ligeantiæ suæ debitum.*"[1] But it came out more clearly still in the fact that the statute recognized, side by side with the offence of high treason or treason to the king, the offence of petit treason—"that is to say, when a servant slayeth his master, or a wife her husband, or when a man, secular or religious, slayeth his prelate to whom he oweth faith and obedience."[2] As we have seen, this particular branch of treason was not abolished till 1828.[3]

(*b*) The clauses which make it treason to violate "the king's companion, or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir,"[4] were probably due to the fact that these were peculiarly aggravated breaches of the feudal bond.[5] But it is not so much what the statute contains as what it omits that shows the influence of these ideas. As is well known, there is no mention in the statute of a conspiracy to levy war; and, as Maitland points out, this is probably due to the fact that such a conspiracy was hardly regarded as an offence if the war was properly declared.[6] In fact, all through the first three centuries after the Conquest the manifold complications of the feudal bond hindered the development of a law of treason. Many English barons owed allegiance both to the king of France and to the king of England; and the king of England himself had sometimes cause to know that he was a vassal of the king of France. In case of war between England and France it was hardly possible to deal with the offences of such persons merely from the point of view of municipal law. An international element was present which could fairly be made the subject matter of a treaty.[7]

(*c*) These difficulties tended to disappear when the kings of England lost their continental possessions; and Edward III. himself could deny that he owed allegiance to anyone, seeing that he claimed to be the king of France. But, though former English kings had as Dukes of Normandy been the vassals of the king of France, in England they had claimed from the time of the Conquest to be above any of their feudal barons. They

[1] Hale, P.C. i 59, 77 n. *a*; Coke, Third Instit. 4.

[2] 25 Edward III. st. 5 c. 2 § 10; see Saunders and Browne's Case (1574) Dyer 332a.

[3] Vol. ii 449 n. 9.

[4] § 3.

[5] P. and M. ii 503.

[6] Ibid 503, 504; below 461.

[7] For these difficulties see Hale, P.C. i 65-70—as Hale points out, when in 1170 Henry II. crowned his eldest son, to whom the king of Scots did homage, we get three kings to whom allegiance was due in different degrees. For such treaties see ibid 69; it is noted, Hale, loc. cit., that in 18 Ed. I. the petition of the Earl of Eu in France for the castles of Hasting and Tikehill is answered by saying that he shall have them when the French king has restored the possessions in France of which he has deprived the English barons.

had, as we have seen, asserted their right to be kings of subjects, and not merely lords of vassals;[1] and the victory of the common law over all its rivals realized the theories of the king's lawyers, that all political power flows from him,[2] and enabled statutory force to be given to many of their ideas touching the contents of treason. Hence we can see that in Edward III.'s statute high treason is the important matter, petit treason merely an archaic survival. The king is really coming to represent the state. He must be guarded with the utmost care, and it must be made an offence not only to kill him, but even to plot against his life. It will be an offence to be adherent to his, that is to the state's, enemies; to levy war against him; or to slay his chancellor, treasurer, or judges whilst acting as his servants.[3]

(*d*) From the time of Glanvil the king's lawyers had imported a Roman element into the law. They not only defined as treasonable, practices which were obviously dangerous to the peace of the state; they also held that certain kinds of forgery were also treason.[4] To the Romans "falsifying Cæsar's image was a kind of sacrilege;"[5] and to this idea we owe the clauses of the statute which make it high treason to counterfeit the king's great or privy seal or his money, or to bring false money into the realm, knowing it to be false.[6]

But these ideas of the king's lawyers were elastic; and the victory of the common law caused their elasticity to become dangerous. We have seen that all the more serious crimes had come to be regarded as offences against the king's peace, his crown, and dignity.[7] That being so, it was becoming a little difficult to draw the line between the mere ordinary felony and the crime of treason. Both were offences against the king. What, it might be asked, was the element which differentiated treason from felony? At the present day we should have little difficulty in answering the question. We should say that the essence of treason consisted in the fact that it was an offence against the safety or well-being of the king as representing the safety or well-being of the state. We shall see that such an

[1] Vol. i 33-34; above 56 n. 1. [2] Vol. i 87-88.

[3] §§ 2, 4, 7 of Edward III.'s statute; cp. with the older authorities—Glanvil, xiv 1, puts down as three of the heads of treason, mors regis, seditio regni, seditio exercitus; Bracton, f. 118b, says, "Habet etiam crimen læsæ majestatis sub se multas species, quarum una est, ut si quis ausu temerario machinatus sit in mortem domini regis, vel aliquid egerit vel agi procuraverit ad seditionem domini regis, vel exercitus sui, vel procurantibus auxilium et consilium præbuerit vel consensum;" seditio in this context probably means "betrayal," P. and M. ii 501 n. 3.

[4] Glanvil xiv 7; Bracton f. 118b, "Continet etiam sub se crimen læsæ majestatis crimen falsi, quod quidem multiplex est: ut si quis falsaverit sigillum domini regis, vel monetam reprobam fabricaverit et hujusmodi;" cp. 119b.

[5] P. and M. ii 503 n. 6. [6] § 6. [7] Vol. ii 358.

answer would have been impossible at this period.[1] The idea that the king had two capacities—a natural and a politic capacity—was not clearly grasped; and the idea itself had come to be associated with excuses for treasonable practices. In fact, to hold this opinion had come to be regarded as in itself treasonable. The use of it attributed to Piers Gaveston and the Despencers had discredited it;[2] and it would almost appear that in Edward II.'s reign the charge of holding this opinion was used for the purpose of founding vague charges of treason, in much the same way as the charge of "accroaching the royal power." But, as there was thus no clear distinction between treason and felony, it was the easier to extend the scope of treason; and there were good reasons why the king should desire to see this extension.

The vagueness of the offence made it a valuable political weapon. It was easier to get a conviction for treason than for any of the more precisely defined felonies; and in case of such conviction it was coming to be thought that no clergy could be pleaded.[3] The consequences of a conviction were far more serious, and, as we have seen, more profitable to the king.[4] Therefore we are not surprised to find cases in which the law was extended for these various reasons. The case of Segrave (1305), who had deserted the king's army and sued in the court of the French king, thus subjecting the king and kingdom of England to France;[5] the cases of the Despencers (1321 and 1326) and of Roger Mortimer (1331) who were convicted of accroaching the royal power;[6] the case of Matravers (1330), who was convicted of treason because he falsely told Edmund, Earl of Kent, the half-brother of Edward II., that Edward II. was still alive, and thereby induced him to commit treason by raising an army for his deliverance[7]—are all illustrations of the manner in which the law of treason was stretched for political objects.[8]

[1] Below 466-467.

[2] Chronicles of Edward I. and II. (R.S.) i 153; ii 33, 65; Statutes (R.C.) i 182; the argument was that "homagium et sacramentum ligiantiæ potius sunt . . . ratione coronæ quam personæ regis . . . ," hence "si rex aliquo casu erga statum coronæ rationabiliter non se gerit, ligii sui per sacramentum factum coronæ regem reducere et coronæ statum emendare juste obligantur" . . . and, as the forms of law are not much use in such a case, "judicatum est quod error per asperitatem amoveatur," because the king's subjects must maintain the law; for a similar idea in Magna Carta and Bracton see vol. ii 213, 255; cp. Harcourt, the Steward and Trial of Peers 152-153; Coke, Calvin's Case (1608) 7 Rep. 11a, calls this opinion "damnable and damned;" see below 466.

[3] Below 297, 299.

[4] For the punishment of treason see P. and M. ii 499; for the forfeiture which was the consequence of it see above 70.

[5] Parliament Roll 1305 (R.S.) 255; Hale, P.C. i 79; Stephen, H.C.L. ii 245.

[6] Hale, P.C. i 80, 81.

[7] Ibid 82.

[8] The Despencers in their answer in 1321 say, "De cunctis sibi oppositis nihil tangit feloniam aut proditionem;" and that "omnes illi, per quos judicium exstitit ordinatum, fuerunt capitales inimici."

The case of Gerberge (1348), who was convicted of treason for highway robbery,[1] and the case of John at Hill (1349), who was convicted for the murder of a king's messenger,[2] are illustrations of the extensions of treason for other objects.[3]

It was doubtless with these cases in their minds that the framers of Edward III.'s statute set to work. Except in the one case of plotting the king's death, they declined to make any mere conspiracies treason—they required an overt act; and they expressly enacted that, "if any man ride armed covertly or secretly with men-of-arms against any other to slay him or rob him or take him or retain him till he have made fine or ransom," it is not treason;[4] they expressly guarded the lord's right to escheat in cases of petit treason;[5] and they attempted to guard against the creation of fresh treasons by judicial interpretation by a clause which required that the statute should be interpreted not by the judges, but by Parliament.[6]

We must now turn to the law of treason as administered under the statute during this period.

(2) Treason in the fourteenth and fifteenth centuries.

The reign of Richard II. was productive of new treasons. As Hale says,[7] "Things were so carried by factions and parties in this king's reign that this statute was little observed; but as this or the other party prevailed, so the crimes of high treason were in a manner arbitrarily imposed and adjudged to the disadvantage of that party that was intended to be suppressed; so that *de facto* that king's reign gives us as various instances of these arbitrary determinations of treasons, and the great inconveniences that arose thereby, as if indeed the statute of 25 E. 3 had not been made or in force." The judges, at the king's bidding in 1388, declared it to be treason to impede the exercise of the royal prerogative.[8] As we have seen, they were themselves

[1] Hale, P.C. i 80. [2] Ibid 81.

[3] Hale tells us that Gerberge pleaded his clergy, but was ousted of it because the charge was treason; and cp. Y.B. 21 Ed. III. Trin. pl. 16, where killing a man who was on his way to help the king at the war was represented as treason.

[4] 25 Edward III st. 5 c. 2 § 13; Hale says, P.C. i 137-138, that "the especial reason of the express adding of this clause seems to be in respect of that judgment of treason given against Sir John Gerberge."

[5] § 11.

[6] § 12; see vol. i 377-378 for the clause and the interpretation put on it; it is fairly clear that, whether it refers to interpretation by the whole Parliament or by the House of Lords, the framers of the statute were, in the light of past experience, not inclined to entrust the manufacture of new treasons to the judges. The case of John Imperial (1380) was decided under this clause; he was a public minister who had come into the country with a royal safe-conduct and had been murdered, Hale, P.C. i 83, and vol. ii 450, 473.

[7] P.C. i 83.

[8] Ibid 84, they were asked, "Qualiter sunt illi puniendi, qui impediverunt regem, quo minus poterat exercere quæ ad regalia et prærogativam suam pertinuerunt," and they replied, "Quod sunt ut proditores etiam puniendi."

appealed of treason, under the general charge of accroaching the royal power.[1] In 1397 it was enacted that it should be treason to compass or purpose the death or deposition of the king, or to render up one's liege homage, or to assemble persons together and ride against the king in order to make war within the realm, or to procure the repeal of statutes made in that Parliament.[2]

The history of treason in this reign in many ways anticipates the growth of the constructive treasons of later law, just as it anticipates later absolutist theories of the prerogative.[3] But the new treasons so created had but a short life. As we have seen, they were repealed in Henry IV.'s reign; and the law laid down in the statute of Edward III. was again restored.[4] All through this period that statute continued to contain the law of treason. The other statutory additions were insignificant.[5] As I have said, the time was not yet ripe for the later growth of constructive treason. In order that it may be possible to extend this, the most important branch of the criminal law, by judicial construction, there must be a law-abiding habit in the nation; and this in the fifteenth century was conspicuous by its absence. Acts of attainder were, as we have seen, a more congenial weapon. But we can see at the end of this period a certain development in the doctrines relative to the prerogative.[6] The king was coming to be regarded less exclusively as a person, more as the official at the head of the state. It is when the prerogative, having restored law and order, had become the most important power in the state, and when legal doctrine had invested it with attributes of a superhuman character, that we get the conditions which will make for a large judicial expansion of the law of treason. As at the end of this period we are but at the beginning of this development of the prerogative, we do not see many signs of the corresponding development in the law of treason.

We do, however, see some signs of the manner in which it will be possible to expand it. Edward III.'s statute had declared, not that killing the king, but that compassing or imagining his death, was treason. In other words, it had made the essence of this species of treason not the act of killing but the intention to kill.[7] We shall see that in the latter half of the fourteenth century certain judges were inclined to take the will for the deed

[1] Vol. ii 560. [2] Ibid 450. [3] Ibid 414.
[4] Ibid 450. [5] Ibid. [6] Below 463-468.

[7] "Donc il fuist demand si on sera mort pur chose que il ne jamais fist. *Newton* dit ouy, que on sera mort, trait, pend, et disclos pur chose que il ne jamais est fait ny consentant ny aidant. Come si on en son fame (? ame) imagine la mort le Roy, et ne ad fait plus, pur cet imaginacion il sera mort come devant," Y.B. 19 Hy. VI. Mich. pl. 103.

and punish felonious intentions, though no act was done.[1] If this was possible in the case of felony, much more was it likely that the judges would, from motives of public policy, give a wider construction to the words of Edward III.'s statute, and declare to be treason any intention which pointed at the death or deposition of the king, however manifested. There are a number of mediæval precedents from Henry IV., Henry VI., and Edward IV.'s reigns which seem to show that the judges were inclined to take this view, and to hold that mere words which showed such intentions were treasonable.[2] In some of them no doubt other overt acts were joined to the speaking of words; but in several the mere speaking of words seems to have been adjudged to be treasonable.[3] We shall see that in the seventeenth century it was held that the mere speaking of words could not amount to treason;[4] but we shall see also that, just as the wording of Edward III.'s statute had made these mediæval decisions possible, so that same wording was in the sixteenth and seventeenth centuries the basis on which was erected the modern doctrine of constructive treason.[5] These mediæval decisions cannot be regarded as the basis of that doctrine. They seem rather to be a different manifestation of a similar idea; and they may by suggestion have helped the judges to arrive at it.

We must now turn from treason to the felonies and other lesser wrongs to person and property. But, before I discuss the history of these different offences, I must deal with two topics which are important chiefly in connection with the law as to felony—firstly, Benefit of Clergy, and Sanctuary and Abjuration; and secondly, Principal and Accessory.

§ 3. Benefit of Clergy, and Sanctuary and Abjuration

Benefit of Clergy and the institution of Sanctuary and Abjuration are the two most important instances in which ecclesiastical law influenced the mediæval criminal law. Benefit of

[1] Below 373 n. 4.

[2] These cases are noted and discussed, and the records in two of them are given in an article by Isobel D. Thornly, E.H.R. xxxii 556-561; for other cases see Hale, P.C. i 111-115; and the collection of precedents in Cro. Car. 118-261.

[3] See e.g. Cro. Car. 121. The accused had not only uttered words, but had calculated the king's nativity and had published seditious ballads; cp. E.H.R. xxxii 556-557.

[4] Bk. iv Pt. II. c. 5 § 1.

[5] Ibid. I cannot agree with the view put forward in E.H.R. xxxii 556-557 that the mediæval decisions were founded on the theory that treason could be committed by words at common law, and that Edward III.'s statute had not superseded the common law; this seems to me to be contrary to the whole history of the law of treason since the statute, and a wholly unnecessary supposition in view of the wording of the statute.

Clergy was, in the earlier part of the Middle Ages, the privilege of the ordained clerk accused of felony; but it was ceasing to be merely this at the latter part of the mediæval period; and it only secured the prolongation of its life till the nineteenth century by becoming a clumsy set of rules which operated in favour of all criminals to mitigate in certain cases the severity of the criminal law. The institution of Sanctuary and Abjuration existed for the benefit of all persons except clerks. It was wider in its extent than Benefit of Clergy in that it applied to a greater variety of cases of wrongdoing; and it was a local rather than a personal privilege. Like Benefit of Clergy, it was radically modified in later law; and, because it was thus modified, it secured a new lease of life. But even in its modified form it gave rise to many abuses; public opinion in many countries turned against it; and so it was abolished some two centuries before the Benefit of Clergy.

Benefit of Clergy

As the result of Becket's murder the royal courts had been obliged to abandon their claim to try and punish a clerk who was guilty of felony; and this abandonment gave rise to the "Benefit of Clergy."[1] Thus it happened that "an ordained clerk who commits any of those grave crimes that are known as felonies, can be tried only in an ecclesiastical court, and can be punished only by such punishment as that court can inflict."[2] This benefit of clergy had a long and curious history; and, in the course of it, it completely changed its meaning. It ceased to be a special privilege of the clergy, and became, as I have said,[3] a complicated series of rules exempting certain persons from the death penalty incurred by those found guilty of certain felonies.[4] In this section I propose to trace the history of this transformation. We shall see that in the thirteenth century it was really a clerical privilege, and to a large extent, it retained its original character all through the Middle Ages. But in consequence mainly of the growing strength of the royal courts, we can already see signs, at the latter part of the mediæval period, of a change in its character. It is not, however, till the sixteenth century that it began to lose its original character of a privilege of the clergy. This change was due mainly to the action of the legislature; and a series of statutes of the two following centuries finally completed the

[1] See vol. i 615 for some account of this controversy.
[2] P. and M. i 424.
[3] Vol. i 615-616.
[4] Till the beginning of the nineteenth century nearly all felonies were punishable with death; the only exceptions were petty larceny (below 366) and mayhem (below 316-317); see Stephen, H.C.L. i 463, 471.

change, and made it a clumsy and intricate set of rules which operated to modify in a very unsatisfactory manner the undue severity of the criminal law. It will be necessary therefore to deal separately with its mediæval and its later history.

Mediæval history.

In the first place, I shall describe shortly the nature of the benefit of clergy in the thirteenth century, and secondly the modifications which were made in the two succeeding centuries.

(1) *The thirteenth century.*

We must consider (i) the procedure when clergy was claimed; (ii) the manner in which the church dealt with its criminals; (iii) the persons who could claim the privilege; and (iv) the cases in which it could not be claimed.

(i) At the beginning of the thirteenth century a clerk arrested on a charge of crime must be delivered up to the bishop if he demands him, and the bishop is bound under a heavy penalty to produce him before the itinerant justices.[1] When the justices come, and the clerk is brought before them, he does not answer the charge, but pleads his clergy, and the official of the bishop demands him as a clerk. He is then delivered to the bishop, and no enquiry takes place in the king's court as to his guilt.[2] But before the end of Henry III.'s reign the king's court, before the clerk is delivered up, takes an inquest as to his guilt.[3] This change may be due partly to the view put forward by Bracton that the king's court can try the clerk; but that it must, if he was convicted, hand him over to the bishop that he may inflict the punishment of degradation which the lay court is incompetent to inflict.[4] Bracton's theory was not completely accepted, for, as Maitland points out,[5] this inquest taken by the king's court is not a trial. It merely ascertained the view of the royal court as to the clerk's guilt or innocence on the evidence before it; and it was for that reason that the taking of such an inquest was allowed to be compatible with a plea of clergy.[6] If the inquest thinks the accused guilty he is delivered to the bishop as guilty, if it thinks him not guilty he is delivered to him as not guilty. If he is delivered as not guilty his lands and goods, if they have

[1] P. and M. i 424; but a man arrested in a liberty with stolen property on him must be sent to the king's prison, though claimed by the ordinary, apparently because a franchise court cannot allow such a claim, the Eyre of Kent (S.S.) i 148.

[2] P. and M. i 424-425, citing Bracton f. 123b.

[3] Ibid.

[4] P. and M. i 429, citing Bracton ff. 401, 401b, 407, 411.

[5] Ibid 425.

[6] The Eyre of Kent (S.S.) i 119 *per* Bereford, C.J.; at this period a man could not plead not guilty, take his trial, and then, if convicted, plead his clergy, below 298.

been seized, will be at once restored; and if he is delivered as guilty, they will be retained till the result of the trial in the ecclesiastical court is known.[1]

(ii) We know little of the manner in which the church dealt with its criminals. But "we have reason to believe that before the end of the thirteenth century its procedure in criminal cases was already becoming little better than a farce."[2] It never adopted the new inquisitorial procedure of the canon law,[3] but continued to employ the old fashioned compurgation.[4] So inadequate a method was this to secure convictions that the royal courts sometimes adopted the device of handing over a clerk *absque purgatione*—that is, they ordered that the clerk should not be allowed to clear himself by compurgation.[5] "In these cases if the ordinary admitted him to his purgation, he was fineable for it as a great misdemeanour, and the party delivered by such purgation shall be again committed to prison."[6] In 1350 the Archbishop of Canterbury had promised the king that he would make an ordinance for the safe keeping and due punishment of clerks delivered to the ordinaries "so that no clerk shall take courage to offend for default of correction;"[7] and there is no doubt that the ecclesiastical courts could sentence to imprisonment for life or to corporal punishment short of death if the clerk failed to clear himself.[8] But it is quite clear that in the ecclesiastical, as in other courts,[9] such a failure was rare, and so the clerks went unpunished.[10]

(iii) The only persons who could claim the privilege were ordained clerks, monks, and nuns.[11] At this period the claimant must prove that he was an ordained clerk by the production of the bishops letters of ordination. The mere claim of the ordinary without this proof was not sufficient.[12] Because the privilege was really the privilege of the ordained clerk no woman (other than a nun) could claim it;[13] and for the same reason it was possible for the church by its legislation to exclude persons from the

[1] P. and M. i 425; see the Eyre of Kent (S.S.) i 107, 141, 154.
[2] P. and M. i 426.
[3] For this see Bk. iv Pt. I. c. 4.
[4] For this see vol. i 305-308.
[5] An instance of a delivery *absque purgatione* will be found in Y.B. 12 Rich. II. 40; it is said in the Eyre of Kent (S.S.) i 83 lxxv that a convicted clerk who was a monk was never admitted to purge himself; for other cases where a clerk was delivered *absque purgatione* see Hale, P.C. ii 384-385.
[6] Ibid 329.
[7] 25 Edward III. st. 3 c. 4.
[8] P. and M. i 427-428.
[9] Vol. i 306.
[10] P. and M. i 427-428.
[11] Ibid 428; as to the nun see ibid n. 2.
[12] The Eyre of Kent (S.S.) i 149—"The Justices must ask the ordinary who claims him where he was ordained, and if he have letters of orders; notwithstanding that the ordinary claims him as a clerk;" it would seem too that the person claiming on behalf of the ordinary must produce authority not only to claim the accused but also to receive him, ibid 123.
[13] Stephen, H.C.L. i 461.

privilege. Thus at the Council of Lyons the "bigamus," that is the man who has married a second wife, or who has married a widow, was excluded from the privilege;[1] and this rule was received in England and given statutory force in 1276.[2]

(iv) Before the end of the thirteenth century the process of excluding certain offences from the benefit of clergy had begun. Henry II. had excluded offences against the forest law;[3] and, after considerable opposition[4] on the part of the clergy, minor offences—transgressiones—were excluded by the beginning of Edward I.'s reign.[5] As it is from these transgressiones that the misdemeanours of our modern law originate, it followed that the benefit of clergy never applied to misdemeanours. It was coming to be thought that the treasons which directly concerned the king were also excluded.[6] But we have seen that in the thirteenth century the offences included within the scope of treason were not accurately defined;[7] and so it was not till Edward III.'s reign that the rule excluding treason was finally settled.[8]

(2) *The fourteenth and fifteenth centuries.*

During these centuries three tendencies are apparent. Firstly, the privilege was extended to persons who were not ordained; secondly, the control of the royal courts both over the conditions under which, and of the procedure by which it was claimed, was enlarged; and thirdly, additional offences were excluded from it.

(i) By the statute pro clero of 1350[9] the privilege was extended to secular as well as religious clerks, i.e. to persons such as door-keepers, readers or exorcists, who merely assisted the clergy in the services of the church.[10] It seems to have been in consequence of this statute that the privilege was later extended to all who could read. But this extension is connected with the greater control assumed by the royal courts over the conditions under which the privilege could be claimed.

(ii) We have seen that all through this period the royal courts kept a very strict control over the ecclesiastical courts.[11] This led them to assume control over the question whether the person

[1] P. and M. i 428.

[2] 4 Edward I. st. 3 c. 5; see Y.B. 30, 31 Ed. I. (R.S.) 530; the Eyre of Kent (S.S.) i 140-141.

[3] P. and M. i 429.

[4] For the controversy over this question see ibid 430 n. 1.

[5] Hale, P.C. ii 325, citing a case of 7, 8 Ed. I.

[6] P. and M. i 429; probably a distinction was taken between those treasons which were immediately against the king's person and others, see Hale, P.C. ii 326 n. (*p*).

[7] Above 290; vol. ii 360.

[8] Hale, P.C. ii 326-327 cites a case of 17 Ed. II. in which, as he says, "a kind of allowance is made of clergy in high treason;" below 299.

[9] 25 Edward III. st. 3 c. 4.

[10] Stephen, H.C.L. i 461.

[11] Vol. ii 304-305.

claiming the privilege was entitled to it or not. This control was an usurpation, for, as Hale says, this was originally a matter for the ordinary;[1] and it could hardly have been exercised by the royal courts till the privilege had become, not a privilege of the clergy, but of all persons, not otherwise disqualified, who could read. It is clear that both the extension of the privilege to all who could read and the control of the royal courts was complete by the end of the fifteenth century. "If," says Hale,[2] "the ordinary had challenged one as a clerk that the court judged not to be such, the ordinary or bishop should be fined, and his temporalities seised,[3] and the felon shall be hanged. Again, if the ordinary refuse one that can read, and return *non legit*, yet the court may hear him, and if they judge him to read sufficiently, the prisoner shall be saved, notwithstanding the refusal and the return of the ordinary."[4] These propositions are supported by abundant authority from this period; and they show that the ordinary is already taking the place of "the minister or at most the assistant to the court, and not the judge."[5]

Similarly, the control of the royal courts was tightened by a change in the procedure by which the privilege was claimed. At the beginning of the fourteenth century the courts refused to allow an accused person to plead to the indictment, and afterwards, if convicted, to plead his clergy. When a person put himself on his country "saving his clergy," Bereford, C.J., said, "What do you suppose is the good of such a putting yourself upon the country as that amounts to? Suppose the jury convicts you; what will have been the use of trying you at all if you can then set up the plea of clergy?"[6] But in 1388 a person who had pleaded not guilty to an appeal of felony was allowed his clergy after conviction;[7] and in the reign of Henry VI. this course was sanctioned by Prisot, C.J.[8] in the case of prisoners indicted, and was usually pursued. The prisoner, instead of pleading his clergy on his arraignment, pleaded not guilty and was tried; and then, if he was convicted, he pleaded his clergy. This course was said to be better for the prisoner as he thereby got a chance of being acquitted by the royal courts.[9] It was also to the advantage of the crown as, on conviction, the crown got the goods of the person convicted; and it was settled at the beginning of the fifteenth

[1] P.C. ii 380. [2] Ibid 381.

[3] As early as 1313-1314 the whole lay fee of an ordinary who had claimed as a clerk one who was really a layman was seised into the king's hand, the Eyre of Kent (S.S.) i 86.

[4] Note that in the Eyre of Kent (S.S.) i 154, before the king's courts had assumed this control, a clerk who was not claimed by the ordinary was hung.

[5] Hale, P.C. ii 381.

[6] The Eyre of Kent (S.S.) i 119; see also ibid 112, 115, lxxv-lxxvii.

[7] Y.B. 12 Rich. II. 40. [8] Hale, P.C. ii 378. [9] Ibid.

century that the goods should not be restored upon the clerk's subsequently making his purgation.[1] Obviously this change in practice increased the hold of the royal courts over these criminous clerks.

(iii) It seems to have been settled before the close of the fourteenth century that "insidiatores viarum" and "depopulatores agrorum" could not claim the benefit of clergy.[2] It was said also that those charged with the wilful burning of houses were also excluded; but there seems to be no clear proof of this.[3] In one case reported in the Eyre of Kent of 1313-1314 a clerk, who had been delivered to the ordinary as guilty, and who had escaped from the bishop's prison, was hung—"for he that breaks the law cannot have the advantage of the law."[4] But this does not seem to have become a recognized case in which the privilege was taken away.[5] In the case of sacrilege clergy was allowed, unless the ordinary refused to claim the accused.[6] In Edward III.'s reign it was settled that those charged with high treason as defined by Edward III.'s statute could not claim clergy.[7] Thus the privilege still extended to petty treason and to nearly all the felonies. It is not till the following period that the list of felonies excluded from it is enlarged.

The later history.

It was inevitable that benefit of clergy should be affected by the changes in the relations of church and state which came in the sixteenth century. Even before these changes the process of modification had begun. A statute of Henry VII.'s reign had attempted to restrict its scope by drawing a distinction between those who were actually in orders and those who were not. In the case of the former no change was made; but the latter, on conviction, were to be branded, and disabled from claiming the privilege a second time.[8] In Henry VIII.'s reign much more radical changes were made. Statutes of 1513,[9] and 1531-1532[10] took away the privilege in a large number of cases from persons who were not actually in orders; and the ordinary was given power to degrade those actually in orders, and to hand them over

[1] Hale, P.C. ii 384.
[2] Ibid 333.
[3] Ibid 333, 346.
[4] The Eyre of Kent (S.S.) i 86.
[5] It is not mentioned by Hale, P.C. ii 332-333; and at p. 385 he points out that it is enacted by 23 Henry VIII. c. 11 that this offence was made felony without benefit of clergy for those not in orders, and that those in orders were to be imprisoned *absque purgatione*.
[6] Hale, P.C. ii 333.
[7] Ibid 332; see also ibid 327-328.
[8] 4 Henry VII. c 14.
[9] 4 Henry VIII. c. 2.
[10] 23 Henry VIII. cc. 1 and 11; the former statute excluded from clergy petty treason, murder, robbery of holy places, robbery in dwelling houses and putting the owner in fear, robbery on or near the highway, burning of dwelling houses or barns where grain is stored; the latter statute deals with breaking the prison of the ordinary.

to be hanged like laymen.[1] By later statutes the privilege was taken away in certain cases from all persons whether in orders or not.[2] If this course of legislation had been pursued benefit of clergy would probably soon have disappeared; and the reform in the law advocated in Italy by Fra Paolo Sarpi in 1613 would have been anticipated in England by nearly a century.[3] But the reaction against the severity of Henry VIII.'s statutes, which produced the abolition of many of the new treasons and felonies created in his reign, produced also the partial restoration of the benefit of clergy,[4] and set in motion the process which made it a complicated set of rules which exempted certain persons from the punishment incurred by the commission of certain felonies.

The history of these changes I shall summarize shortly under the following heads: firstly, the persons who could claim the privilege; secondly, the consequences of successfully claiming the privilege; and, thirdly, the growth of the non-clergyable felonies.

(i) The class of persons who could claim the privilege was extended, and distinctions were drawn between them. In 1547 [5] "bigami," and in 1692 [6] women were allowed to claim it. In 1705 [7] the necessity for reading was abolished. The distinction drawn in 1489 between those actually in orders and those not [8] was preserved; and in 1547 [9] a peer was for a first offence given the privilege of a clerk actually in orders.

(ii) We have seen that the Act of 1489 had enacted that every person not actually in orders who was convicted of a clergyable felony should be branded;[10] and in 1576 [11] the court was given power to imprison such persons for any term not exceeding one year. In 1717 [12] it was enacted that such persons, if convicted of clergyable larcenies, were to be transported for seven years instead of being branded. It followed that those actually in orders and peers for a first offence escaped all punishment, and that in the case of all others their punishment was mitigated in the manner prescribed by the Acts just mentioned.

[1] 23 Henry VIII. c. 1 § 4; 23 Henry VIII. c. 11 § 3; see 25 Henry VIII. c. 3 for an amending Act to prevent certain evasions of these two Acts by standing mute, challenging over twenty, or by escaping to another country.

[2] 27 Henry VIII. c. 17; 28 Henry VIII. c. 1; 32 Henry VIII. c. 3.

[3] For an account of his work on the Immunity of the Clergy see Alexander Robertson, Fra Paolo Sarpi 226-228; below 307 n. 9.

[4] 1 Edward VI. c. 12 § 9; but it was soon found necessary again to deprive certain offences of the benefit of clergy, see 2, 3 Edward VI. c. 33; 5, 6 Edward VI. cc. 9 and 10.

[5] 1 Edward VI. c. 12 § 15.

[6] 4 William and Mary c. 9; 21 James I. c. 6 had allowed women the privilege in the case of the larceny of goods under 10s. in value.

[7] 5 Anne c. 6.

[8] Above 299.

[9] 1 Edward VI. c. 12 § 13.

[10] Above 299.

[11] 18 Elizabeth c. 7.

[12] 4 George I. c. 11; 6 George I. c. 23.

Till 1576 the person who successfully pleaded his clergy was handed over to the ecclesiastical court to make his purgation. It is true that he might have been handed over *absque purgatione;* but Hale cites no instances of such a proceeding later than 1487.[1] During the sixteenth century it was realized that the process of making purgation was a mere farce which turned "the solemn trial of truth by oath into a ceremonious and formal lie."[2] For this reason the ceremony of delivering to the ordinary and purgation was abolished in 1576;[3] and, as we have seen, the court was given power to order that those not actually in orders should, on conviction, be imprisoned for a year.

(iii) During the sixteenth and seventeenth centuries a large number of felonies were excluded from benefit of clergy. The series begins in 1496,[4] when a statute was passed which deprived laymen of clergy if they committed petty treason. By successive statutes passed during the sixteenth and seventeenth centuries the following offences were deprived of the benefit of clergy—petty treason, murder in churches or highways, and later all murders, certain kinds of robbery and arson (except in the case of clerks in orders), piracy, burglary and house-breaking if any one was in the house and put in fear, horse-stealing, rape, abduction with intent to marry, stealing clothes off the racks, or stealing the king's stores.[5] And the list was largely increased during the eighteenth century. Blackstone in 1769 says that at that date no less than 160 offences had been declared to be felonies without benefit of clergy.[6]

It was to a large extent due to the manner in which these statutes dealt with the benefit of clergy that the law relating to it came to be so complex. It is clear from Hale's Pleas of the Crown that in his day, though certain general rules could be stated, it was not possible to give a complete account of this branch of the law without a careful study of the statute law applicable to each particular felony.[7] The main reason has been clearly pointed out by Stephen. He says:[8] "A trial might end either by the accused person standing mute and being pressed to death, or by his challenging too many jurors and being hanged,

[1] P.C. ii 328, citing Y.B. 3 Hy. VII. Mich. pl. 5, where it was said that those who had confessed, abjured the realm, been outlawed, or had become approvers, were to be handed over *absque purgatione.*

[2] "The perjuries indeed were sundry: one in the witnesses and compurgators; another in the jury, compounded of clerks and laymen. And of the third, the Judge himself was not clear, all turning the solemn trial of truth by oath into a ceremonious and formal lye," Searle v. Williams (1620) Hob. at p. 291.

[3] 18 Elizabeth c. 7. [4] 12 Henry VII. c. 7.

[5] Stephen, H.C.L. i 464-466; for some illustrations see 8 Elizabeth c. 4; 18 Elizabeth c. 7; 39 Elizabeth cc. 9 and 15; 1 James I. c. 8.

[6] Comm. (2nd ed.) iv 18, cited Stephen, H.C.L. i 470.

[7] P.C. ii 323-390, cc. xliv-liv. [8] H.C.L. i 466.

or by his pleading guilty, or by his being convicted and pardoned, or by his being convicted and attainted. If a statute taking away clergy did not expressly mention all these possible cases, and take away clergy in all of them, both from the principal and from his accessories both before and after, clergy remained in every omitted case. Hence questions arose on the special wording of every statute, as to whether it ousted an offender of clergy not only if he was convicted, but if he pleaded guilty, if he stood mute, etc., and similarly as to his accessories."[1] Some simplification was made by a statute of 1691,[2] which in effect provided that an exclusion from the benefit of clergy should extend to a conviction upon any of these grounds; and by a statute of 1702[3] which made a similar rule in the case of accessories. But though the law had been considerably simplified it was still very technical. In particular it appears from Blackstone that the question whether a statute took away clergy from the accessory as well as from the principal turned upon the somewhat fine distinction between words which took it away from the offence and words which took it away from the person committing the offence.[4]

Blackstone's habit of praising somewhat indiscriminately all the laws and institutions of England is perhaps most strikingly illustrated by his panegyric on the benefit of clergy as it existed in his day. "The wisdom of the English legislature," he says,[5] "has, in the course of a long and laborious process, extracted by a noble alchemy rich medicines out of poisonous ingredients, and converted, by gradual mutations, what was at first an unreasonable exemption of particular popish ecclesiastics, into a merciful mitigation of the general law with respect to capital punishment." It never seems to have occurred to Blackstone that a penal system which needed such a corrective was obviously defective, or that the correction thus administered was to the last degree absurd and capricious. It was not till 1827 that these obvious facts induced the legislature to abolish the benefit of clergy.[6]

[1] A good illustration of the difficulties thus caused will be found in the discussion in Foster, Crown Law 332-336, of the question whether 25 Henry VIII. c. 3 was revived wholly, as Coke maintained (Powlter's Case (1611) 11 Co. Rep. 29), or only partially, by 5, 6 Edward VI. c. 10.

[2] 3 William and Mary c. 9 § 2.

[3] 1 Anne st. 2 c. 9.

[4] Comm. iv. 366-367.

[5] Ibid 364.

[6] 7, 8 George IV. c. 28; Stephen tells us, H.C.L. i 462, that when this Act was passed the clause of the Act of 1547 which gave a special privilege to peers (above 300) was overlooked; and that on the occasion of Lord Cardigan's trial in 1841 it was a question whether, if convicted, he might not claim his clergy; the case of peers was specially dealt with by 4, 5 Victoria c. 22 which repealed this clause of Edward VI's Act.

Sanctuary and Abjuration[1]

This institution was a striking feature of the criminal law of the Middle Ages. The form which it had assumed during the period which stretches from the thirteenth to the first half of the sixteenth century, can be described shortly as follows: A person who has committed a crime can flee for refuge to consecrated soil. The coroner must then be summoned, to whom the criminal must confess his guilt. Then, on taking an oath to abjure the kingdom, he will be allowed to proceed in safety to a port assigned to him. He must reach this port, and he must embark from it within a certain number of days, unless prevented by causes beyond his control.[2] This institution has obviously two quite distinct and almost contradictory roots—the principle that certain places are sanctuaries which will protect from human punishment those who take refuge there, and the rule that the person so taking refuge there must, as punishment for his crime, abjure the kingdom.[3]

The principle that certain places are sanctuaries which will protect from human punishment is, as M. Reville has said, not a product of Christianity, but a legacy from antiquity. "But the Church made of it a universal institution; the converted barbarians accepted it along with their new faith; . . . and so at the beginning of the mediæval period it had become part of the public law of the kingdoms which had been founded on the ruins of the Roman Empire."[4] It appears in the Anglo-Saxon laws;[5] and, having been taken over by the Conqueror, it appears in those collections of Anglo-Norman laws which purported to state the laws of Edward the Confessor[6] and William I.[7] But, as was the case on the Continent,[8] none of these laws promised complete immunity to the criminal. They merely saved him from capital punishment. How then was he to be punished? As regular prisons did not exist, the only alternative was exile and forfeiture of property. It was probably this fact that connected the institution of abjuration with that of sanctuary.[9]

It is possible that the origin of abjuration is to be sought in the institution of outlawry.[10] Outlawry was the penalty for various

[1] The best account of this institution is to be found in a paper on Abjuratio Regni by Andre Reville, Revue Historique vol. 50 1-42 (1892).

[2] See P. and M. ii 588-589.

[3] Reville 4, 5.

[4] Op. cit. 10-11.

[5] Laws of Ine c. 5; Laws of Alfred c. 5; Laws of Athelstan IV. 4; Laws of Ethelred VII. 5.

[6] "Quicumque reus vel noxius ad ecclesiam pro presidio confugerit, ex quo atrium ingressus fuerit securus sit, et a nemine insequente ullo modo apprehendatur, nisi per pontificem loci illius, vel ministros ejus," c. v.

[7] "Cujuscumque criminis reus, si ad ecclesiam confugerit, pacem habeat vitæ et membrorum," c. l.

[8] Reville 12.

[9] Ibid.

[10] Ibid 5-8.

offences in the Anglo-Saxon laws. It involved forfeiture of goods, and necessitated removal from the state, the protection of which had been withdrawn; and in the laws of Ethelred and Canute the outlaw and the banished man are spoken of as if they were identical.[1] But there is one obvious distinction between them. A decree of outlawry is generally pronounced against a person who will not appear. On the other hand, a man who has been arrested can be banished—can be forced, that is, to abjure the realm. And such a man, if he is forced to abjure the realm, can be made to take an oath that he will depart and will not return. Such abjuration was known as a definite punishment in the twelfth and thirteenth centuries.[2] Two well-known persons punished in this way by Edward I were Piers Gaveston and Thomas de Weyland.[3] But, at the end of the thirteenth century, it seems to have dropped out of use as a definite punishment, and was not revived as such till the practice of transporting criminals to the colonies began in 1597.[4] It survived only as an appendage to the right of sanctuary, for it supplied exactly the punishment which was needed for those who had escaped the capital penalty by reaching a place of refuge.[5]

The books of Bracton,[6] Britton,[7] and Fleta,[8] show that by the end of the thirteenth century the institution was well established; and, as thus established, it had passed over to France—perhaps from England.[9] It is not surprising therefore to find that some legal learning was beginning to accumulate round it.

It seems to have been the rule that only consecrated ground could afford a sanctuary;[10] but apparently other places might get the privilege by papal bull or royal charter.[11] Naturally the problem of the man in the sanctuary who refused to abjure soon presented itself. Bracton denied that he could be forcibly removed, but asserted that, after the lapse of forty days, he could be starved into surrender;[12] and his view prevailed,[13] except in the

[1] Institutiones Ethelredi I. 1 (Thorpe ii 511); Cnuti Institutio Legum Secularium c. 13 (Thorpe ii 531).

[2] Thus as Reville points out, op. cit. 9, the assizes of Clarendon and Northampton provided this penalty for those accused of murder, theft or arson who were found guilty by ordeal, and even for those found not guitly if they were suspect.

[3] Reville 10, citing Rymer, Fœdera (Rec. Com.) I. pt. i 209-210, and R.P. i 283b.

[4] Ibid 41-42—"Or au debut, on les expédiait, non dans un colonie pénitentiaire ni en un lieu speciale, mais seulement au delà des mers, à charge de vivre où ils pourraient et comme ils l'entendraient. Sous cette forme première, n'était ce pas une reminiscence plutôt, qu'une innovation? C'était l'antique abjuration, moins le serment, mais avec les mêmes sanctions."

[5] "Elle offrait le triple avantage de satisfaire l'Eglise, vu qu'elle respectait la personne des condamnes, d'enricher le roi, qui s'attribuait leurs depouilles, et de prevenir les recidives par l'expulsion des coupables," ibid 12.

[6] ff. 135b-136a. [7] Vol. i 61. [8] I. c. 29.

[9] Reville 13, 14. [10] Ibid 15.

[11] Ibid; and cp. Brooke, Ab. *Corone* pl. 181.

[12] f. 136a. [13] Staunford, P.C. 118b, 119.

case of the northern sanctuaries, such as that of St. John of Beverley, where the criminal, on taking the oath to the lord of the liberty, could remain all his life.[1] If the criminal took the oath of abjuration he must not diverge from the route which was assigned to him. If he did, he was liable to be arrested and executed out of hand; and the same results followed if he returned to England without the royal licence.[2] No doubt many, either because they could not find means of transport, or because they were willing to take the risk, disappeared on their journey, and swelled the ranks of roving brigands with which the country was infested.[3] Probably it was only a small proportion of these who were caught; but if they were caught they were always hung.[4] The effects of abjuration were exactly the same as those of a condemnation to death except that the criminal's life was spared. His goods were forfeited, his lands escheated, and his wife was treated as a widow.[5]

Certain persons were not allowed to take sanctuary—those who had been condemned whether or not sentence had been passed, those taken with the stolen property on them,[6] and clerks.[7] The last named must, as the church had successfully insisted in the thirteenth century, be handed over to the ecclesiastical courts.[7] Certain offences also, such as felonies committed in churches,[8] prevented the offender from taking sanctuary. But, with this exception, the extent of the privilege was considerably wider than the extent of the privilege conferred by the benefit of clergy. It perhaps extended to treason;[9] and it was made use of by those who were guilty of minor offences,[10] and even by debtors who wished to evade payment of their debts. Several petitions were presented to Parliament against this abuse of sanctuary by fraudulent debtors;[11] and in 1379[12]

[1] Reid, The King's Council in the North 13-14.

[2] Reville 17, 18; but if he had been compelled to leave the road through no fault of his own he was sent on his way again, ibid 27, citing Fitzherbert, Ab. *Corone* pl. 14.

[3] Reville 23, 26; cp. The Eyre of Kent (S.S.) i lxxiii.

[4] Fitzherbert, Ab. *Corone* pl. 14 (P. 21 Hy. VI.); pl. 65 (7 Hy. VII.); pl. 72 (8 Hy. IV.).

[5] Reville 18, 19.

[6] Bracton f. 136a; Brooke, Ab. *Corone* pl. 110.

[7] Reville 20; Articuli Cleri, 9 Edward II. st. 1 c. 15.

[8] Staunford, P.C. 117a; Coke, Third Instit. 115.

[9] This is denied by Staunford, P.C. 116a; but see Y.B. 1 Hy. VII. 23-24; R.H.S. Tr. 3rd Ser. xi 113; it was necessary to provide by 26 Henry VIII. c. 13 § 2 that it should not apply to treasons created by that Act.

[10] This is reasonably clear from R.P. iii 37, below 306 n. 1; but it is denied by Brooke, Ab. *Corone* pl. 181, who says that it was confined to cases where the criminal was in jeopardy of his life; considering the serious consequences of abjuration it was probably mainly used in these cases.

[11] R.P. ii 369 (50 Ed. III. no. 51); iii 37 (2 Rich. II. no. 28).

[12] 2 Richard II. st. 2 c. 3.

it was enacted that if a debtor thus seeking to evade his creditors had been summoned to the door of the sanctuary once a week for five weeks, judgment should be given against him, and that his creditors should have execution against his property.

In 1378 an unsuccessful attempt was made to restrict it to crimes capitally punished;[1] and, during the fifteenth century, it was several times attacked,[2] and the abuses arising from it in particular cases pointed out.[3] But in the face of the opposition of the clergy nothing could be effected. It was not till the sixteenth century that any serious changes were made; and, as we shall now see, these changes prolonged its life for nearly a century.

The existing law was enforced in 1529,[4] with the addition that the abjuring criminal should, for purposes of identification, be marked in the hand with the letter A. In the following year came a great change.[5] Banishment was beginning to lose some of its terrors; and the legislature discovered that these criminals who thus voluntarily banished themselves were often "expert mariners" or "very able and apt for the wars and defence of this realm." It was therefore enacted that persons who had abjured should go to such sanctuary as they should choose and remain there for life, on pain of death if they left it. It was further provided that sanctuary men who again committed felony should lose all privilege of sanctuary. In 1535-1536 further provision was made for the discipline of these sanctuary men while in sanctuary.[6] Finally, in 1540,[7] the places which should be regarded as sanctuaries were defined by the Act; and, where the boundaries of existing sanctuaries were ill-defined, a commission was appointed to ascertain them. Only twenty inmates were to be allowed in each privileged place. They were to be mustered daily; and, if they failed without excuse to appear for three days in succession, they lost their privilege. The same result followed if, while in sanctuary, they committed felony. No privilege of sanctuary was to be allowed for those guilty of murder, rape, burglary, robbery, arson, or sacrilege.

Henry VIII.'s legislation as to the privilege of sanctuary did not suffer the same fate as his legislation as to the benefit

[1] The petitioners stated that the judges had said that the church ought to have no immunity for debts or trespass, but for crime only; and that the doctors of the civil and canon law had said "que en cas de dette, d'accompte, ne pur trespass fait, si homme n'y doit perdre vie ou membre, nully doit en Sainte Eglise avoir Immunite," R.P. iii 37 (2 Rich. II. no. 28).

[2] R.P. iii 503-504 (4 Hy. IV. no. 70); R.P. iv. 291 (3 Hy. VI. no. 39).

[3] R.P. v 247-248 (31, 32 Hy. VI. no. 45); R.P. vi 110 (14 Ed. IV. no. 6).

[4] 21 Henry VIII. c. 2.

[5] 22 Henry VIII. c. 14.

[6] 27 Henry VIII. c. 19.

[7] 32 Henry VIII. c. 12.

of clergy.[1] It is true that Edward VI.'s legislation restored the privilege of sanctuary, as it restored the benefit of clergy, in the case of certain crimes which had been excluded from it by Henry VIII.'s legislation.[2] But the other restrictions imposed by that legislation remained; and in at least one case a statute which took away the benefit of clergy also took away the privilege of sanctuary.[3] But the modified system of sanctuary introduced by Henry VIII.'s legislation did not work well.[4] It was repealed in 1603[5] and so the common law was restored. But this restoration was hardly tolerable in the seventeenth century. Public opinion in all countries, Roman Catholic and Protestant alike, was turning against it. Innocent VIII. had, as early as 1487, declared that it should not be available for fraudulent debtors;[6] Francis I. had abolished it in France in 1539;[7] the papacy in 1591 withdrew it from assassins, heretics, traitors, brigands, and those who stole in churches or on the highways;[8] and in 1613 Fra Paolo Sarpi advocated a series of restrictions very similar to those effected by Henry VIII.'s legislation.[9] This changed state of public opinion made it possible to effect that abolition of the whole institution which had been vainly urged in the fifteenth century; and so it was abolished in 1623-1624.[10]

The result of this statute was that sanctuary with its pendant abjuration ceased to exist as a legal institution. But we shall see that certain so called sanctuaries existed till the eighteenth century, which gave practical immunity to fraudulent debtors and even to criminals.[11] They existed in spite of statutes passed to suppress them; and did not wholly disappear till the arm of the law was strengthened by the establishment of an efficient police system.

§ 4. Principal and Accessory

The common law knows four kinds of parties to the commission of felonies. There is the principal in the first degree, i.e. the man who actually commits the felony; the accessory at the fact, or the principal in the second degree, i.e. the man who is present at the commission of the felony aiding and abetting; the

[1] Above 300.
[2] 1 Edward VI. c. 12 § 9.
[3] 2, 3 Edward VI. c. 33.
[4] "To say the truth, Abjuration was exceedingly intricated and perplexed by the said Act of 22 H. 8 c. 14 and other statutes," Coke, Third Instit. 115.
[5] 1 James I. c. 25 § 7.
[6] Reville 33.
[7] Ibid 34.
[8] Ibid 40.
[9] He wrote a book on "Sanctuaries for Offenders" in 1613, which Grotius called a great book, in which he advocated a reduction of the number of sanctuaries, and that they should be placed under the control of the state, Alexander Robertson, Life of Sarpi, 226-228.
[10] 21 James I. c. 28 § 7.
[11] Bk. iv Pt. I. c. 7.

accessory before the fact, i.e. the man who counsels, procures, or commands the felony; and the accessory after the fact, i.e. the man who "receives and comforts" the felon, thus aiding him to escape from justice.[1]

This classification of the parties to a crime is only important in the case of felony. The rule was very early laid down that in the case of treason[2] and trespass[3] (which, as we have seen, became the misdemeanour of later law) all concerned were principals. No doubt in the case of treason the reason for this rule was primarily the desire to suppress the greatest crime known to the law; and a technical reason could be found for it in the fact that the essence of the most important head of treason lay, not in the act of killing, but in the intention to kill the king. The trespasses had, as we have seen, their civil as well as their criminal side; and, seeing that all concerned in a trespass were equally liable to pay damages if sued by the injured party in a civil action, it was only logical to make them all equally liable to punishment if prosecuted by the crown.

The common law had at the end of this period reached the conclusion that no distinction could be drawn between principals and accessories at the fact. Both were principals in the first and second degree respectively.[4] In the case of accessories before and after the fact the law started from two leading principles. The first was that the accessory cannot be tried until the principal has been convicted.[5] No doubt the stringency of this rule was, as Maitland has pointed out, due to the fact that the older methods of trial were appeals to the judgment of God; and, "what could we think of the God who suffered the principal to come clean from the ordeal after the accessory had blistered his hand?"[6] The second principle was that accessories, whether before or after the fact, deserved the same punishment as the principals.[7]

The cases in the Year Books are concerned for the most part in (1) elaborating the distinctions between principals and

[1] Kenny, Criminal Law chap. vi. [2] Y.B. 19 Hy. VI. Mich. pl. 103.

[3] Y.B. 30, 31 Ed. I. (R.S.) 106-108; cp. Y.B. 20, 21 Ed. I. (R.S.) 392. Nor could there be any accessories before the fact in the case of manslaughter, "for manslaughter ought to ensue upon a sudden debate or affray," Bibithe's Case (1597) 4 Co. Rep. 44a.

[4] Below 309.

[5] Y.B. 33-35 Ed. I. (R.S.) 54; in Y.B. 30, 31 Ed. I. (R.S.) 506 a decision to the contrary is noted as having been rather "ad appruyamentum regis," than "ad legem manutenendum;" Y.B. 19 Ed. III. (R.S.) 176 the rule is stated as well settled.

[6] P. and M. ii 508; cp. vol. i 302-311.

[7] This principle is as old as the Assize of Clarendon (1166), see P. and M. ii 508. Is it possible that we see here a faint trace of the old principle of the liability of the family as a group (see vol. ii 36; and cp. Brissaud ii 1370, 1371)? The extension of the activities of the state makes for individual responsibility; but reminiscences of the old principle might well lead to this result where several were concerned in the commission of a crime.

accessories, and (2) in working out the consequences of the rule that you cannot try the accessory unless the principal has been convicted.

(1) A distinction was drawn between those who were present aiding, or prepared to aid, in the commission of a felony, and those who were merely bystanders and simply remained passive. The first were principals in the second degree; the second, though they were finable for not raising the hue and cry, were not guilty of felony as principals or accessories.[1] The distinction between principals in the second degree and accessories before the fact was not at first clearly drawn. Bracton regarded the former as accessories;[2] and his view seems to have been acted on at least once in Edward III.'s reign.[3] But there are earlier cases which lay down the modern rule;[4] and it was clearly established in Henry VII.'s reign.[5] Its practical importance lay in the fact that if a man was principal in the second degree he could be tried whether or not the principal in the first degree had been convicted. The question what assistance would render a man accessory after the fact was discussed in several cases. It was settled that the assistance must be of such a kind as to aid the man to escape from justice by illicit means. Mere advice or petitions for release were innocent,[6] and so was the mere receipt of stolen property, as that did not amount to help given to the prisoner himself.[7] Some difficult questions arose in the case where the unlawful assistance had been given in a county different from that in which the crime had been committed, because knowledge of the crime could not be presumed in the accessory, and because he could not be tried by a jury of either county.[8]

(2) The varieties of the modes of trial; the intricacies of procedure; the possibility that a person, though convicted, might escape by pleading his clergy, or by getting a pardon; the difference between a pardon after a verdict of *se defendendo* or misadventure, and a pardon which was not so much a matter of course—all made the application of the rule that you cannot try the accessory unless the principal has been convicted exceedingly complicated.[9] Indeed, the technicality and complexity of the rules upon this subject will bear comparison even with the rules

[1] Fitz., Ab. *Corone* pl. 395 (8 Ed. II.).

[2] In his day these principals in the second degree were appealed, not *de facto*, but *de vi et forcia*—you must convict the chief culprit before you try them, P. and M. ii 508 n. 1; Plowden at pp. 99-100 gives a clear account of the history of the development of the law on this matter.

[3] Fitz., Ab. *Corone* pl. 90 (40 Ed. III.).

[4] Ibid pl. 314 and 350 (3 Ed. III.); and cp. pl. 86 (11 Hy. IV.).

[5] Y.B. 4 Hy. VII. Mich. pl. 10 = Fitz., Ab. *Corone* pl. 60; Hale, P.C. i 437.

[6] 26 Ass. pl. 47.

[7] 27 Ass. pl. 69.

[8] Staunford, P.C. i c. 46.

[9] See ibid cc. 49 and 50.

of procedure which governed the working of the real actions. Though some of the points debated in the Year Books were settled in the later law, the complexity of the rules tended to increase in consequence of the provisions of the numerous statutes which created new felonies, and of the mode in which those statutes were interpreted by the judges.[1] It would be both tedious and useless to enter into a detailed account of them. No doubt, as Stephen says, they helped to mitigate the harshness of a code which meted out to accessories the same severe punishments as it meted out to principals. For, "The result of them was that if the principal died, stood mute, challenged peremptorily more than the proper number of jurors, was pardoned, or had his clergy, the accessory altogether escaped."[2] It was not till Anne's reign that these rules were in any way changed.[3] Even then the accessory could not be tried "till the guilt of the principal had been legally ascertained by conviction or outlawry, unless both were tried together."[4] In 1826 it was enacted that accessories before the fact should be able to be indicted of a substantive felony independently of the principal;[5] and in 1847 a similar provision was made in the case of accessories after the fact.[6] Accessories after the fact had always had the benefit of clergy.[7] When this was abolished, in 1827,[8] statutory provision was made for the punishment of the felonies to which this privilege had been attached;[9] and in 1862 special provision was made for the punishment of all accessories after the fact.[10]

§ 5. Offences Against the Person

In this section I shall deal firstly with the common law felony of homicide and the statutory felony of rape, and secondly with offences against the person under the degree of felony. The few additional statutory felonies created during this period have already been mentioned,[11] and do not call for further comment.

Homicide.

At the present day we can divide homicides into two great classes—those which are innocent and those which are felonious. Under the first class fall justifiable homicides, e.g. those committed

[1] Stephen, H.C.L. ii 234, 235.
[2] Ibid 232; see Syer's Case (1590) 4 Co. Rep. 43b; Bibithe's Case (1597) ibid.
[3] 1 Anne st. 2 c. 9.
[4] Foster, Crown Law 360, cited Stephen, H.C.L. ii 235; cp. Lord Sanchar's Case (1613) 9 Co. Rep. at f. 120b.
[5] 7 George iv c. 64 § 9.
[6] 11, 12 Victoria c. 46 § 2.
[7] Stephen, H.C.L. ii 237.
[8] 7, 8 George iv c. 28 § 6.
[9] Ibid § 8.
[10] 24, 25 Victoria c. 95 § 4; 24, 25 Victoria c. 100 § 67.
[11] Vol. ii 451.

in the execution or the advancement of justice, or in defence of life,[1] and excusable homicide, e.g. killing in the course of a sudden combat (*chance-medley*) when there is no other means of escape, or killing by misadventure in the course of a lawful act. Under the second class fall suicide, murder, and manslaughter.[2]

All through this period the law is only feeling its way tentatively towards this classification. It has but recently emerged from the stage in which any kind of homicide gives rise to a criminal appeal at the suit of the murdered man's kin[3]—a state of the law not far removed from that in which homicide gives rise sometimes to claims to *wer* and *bot*, and sometimes to *wite* or blood feud.[4] As we have seen, all through this period appeals were known;[5] and their prosecution often gave rise to some pretty legal problems as to who were entitled to bring them and the like.[6] But they were gradually giving place to the royal procedure by way of indictment; and that procedure is founded on the modern notion that the repression of homicide is the affair of the state. Moreover, as we have seen, the royal lawyers were beginning to distinguish between the guilt of various forms of homicide by reference to the circumstances under which they were committed.[7] No doubt Bracton's speculations, which he derived from Bernard of Pavia, were too fine-drawn to suit the common law of this period, or indeed any system of merely human law.[8] No doubt, too, there were peculiar difficulties in England, where, although the procedure by way of indictment was superseding the procedure by way of appeal, yet the substantive law as to the offences for which men could be indicted retained many traits of its ancient origins in the atmosphere of deodand, *wer*, and blood feud. In spite of this we can see that throughout this period the work of discriminating between homicide and homicide goes on; and, at the end of it, we are not very far from the main outlines of the scheme of later law. But even then the outlines are very bare. The production of the finished picture will require many centuries of judicial labour, with occasional assistance from the legislature.

We start, then, with the broad rule that homicide is an offence, felonious or otherwise. Practically the only exceptions are the

[1] See The Eyre of Kent (S.S.) i 98-99.

[2] Kenny, Criminal Law chaps. viii and ix.

[3] Vol. ii 197, 362; as we have seen, a person if appealed of homicide must swear that he had done nothing whereby the deceased was "further from life or nearer to death."

[4] Vol. ii 43-46; P. and M. ii 474.

[5] Vol. ii 362-364.

[6] Y.B. 1, 2 Ed. II. (S.S.) 42; Fitz., Ab. *Corone* pl. 41, 322, 385; vol. ii 362 n. 1.

[7] Bracton f. 104b, "Item crimen homicidii, sive sit casuale vel voluntarium, licet eandem pœnam non contineat, quia in uno casu rigor et in alio misericordia."

[8] Vol. ii 258-259.

cases where it is committed in execution of the sentence of a competent court, in the arrest of felons when such arrest cannot be otherwise effected,[1] and by statute in the case of foresters or parkers who slew a trespasser whom they were attempting to arrest.[2] The narrowness of these exceptions is, as Maitland points out, illustrated by the fact that it was thought advisable in 1532 to pass an Act to make it clear that a person who killed another who had tried to rob him in his house or on or near the highway did not incur a forfeiture of his goods.[3] Apart from these exceptions there is abundant authority for the proposition that all other homicide was an offence. The most striking illustration of this fact is the rule that the man who had committed it by misadventure or *se defendendo* (though not guilty of felony) needed a royal pardon.[4] The Statute of Gloucester (1278) regulated the procedure to be followed in such cases.[5] It enacted that a person accused of homicide "without felony" must remain in prison till the coming of the justices in eyre or of gaol delivery; that he must then plead to the indictment; and, "in case it be found by the country that he did it in his defence or by misfortune, then by the report of the justices to the king the king shall take him to his grace if it please him." Even then, however, the accused would forfeit his chattels if he had fled on account of his act, and later, whether he had fled or not.[6] Moreover, the royal pardon, when obtained, did not shelter the accused from proceedings by way of appeal.[7] In the old days of *wer* and *bot* the person who slew another, even though it was by misadventure or in self-defence, had been liable to pay the statutory sums to the deceased's kin. In the old days therefore he would not have escaped scot free if "appealed" of the death by the kin; and therefore he

[1] Bracton's Note Book case 1084; Northumberland Assize Rolls (Surt. Soc.) 94; Y.B. 30, 31 Ed. I. (R.S.) 512; Fitz., Ab. *Corone* pl. 179 *per* Thorpe; cp. also ibid 192, 194, 261, 288; Hale, P.C. i 489-492.

[2] 21 Edward I. st 2; P. and M. ii 477 n. 2.

[3] 24 Henry VIII. c. 5; P. and M. ii 477 n. 5. Maitland says, citing North. Assize Rolls 85, that he does not think that a homicide in self-defence would have been justifiable, even though perpetrated in the endeavour to prevent a felony, and this is borne out by the Eyre of Kent (S.S.) i 131-132, 139, 150; but in Edward III.'s reign the point was discussed and it was decided that the accused did not require a pardon, but went quit, 26 Ass. pl. 23 and 32; cp. also Y.B. 21 Hy. VII. Mich. pl. 50; Henry VIII.'s statute was passed, as the preamble states, to clear up the doubt and make the law more precise, Cooper's Case (1640) Cro. Car. 544; Hale, P.C. i 487; Stephen, H.C.L. iii 39, 40.

[4] For examples see P. and M. ii 478; Register ff. 309, 309b; Stephen, H.C.L. iii 37-39; cp. Select Pleas of the Crown (S.S.) pl. 114, 188; Fitz., Ab. *Corone* pl. 302 and 354—in the latter case there is a special direction that the man is not to be put in irons. As no felony was committed, no one could be indicted as accessory, Y.B. 15 Ed. III. (R.S.) 262.

[5] 6 Edward I. c. 9.

[6] P. and M. ii 479; Stephen, H.C.L. iii 76, 77.

[7] Vol. ii 54, 363 n. 2; Y.B. 30, 31 Ed. I. (R.S.) 514; P. and M. ii 481.

cannot escape scot free if indicted by the crown. The fact that the result of conviction upon an appeal or an indictment was no longer a money payment, but death or mutilation, made no difference to the liability; and the mercy of the king would suffice where it was clearly wrong that such liability should be enforced. When appeals went out of use, and the royal pardon became a matter of course, the need for getting it became a mere formality. The simpler course was adopted of allowing jurors to return verdicts of not guilty in such cases.[1]

The rules as to what would amount to misadventure or self-defence were gradually evolved. In early days "there could be little law about this, for all depended upon the king's grace."[2] We can see from the Year Books of Edward IV.'s and Henry VII.'s reigns that a person could establish the defence of misadventure if he could show that, while engaged in a lawful act,[3] he had accidentally killed another; and this, it was pointed out, was the great distinction between criminal and civil liability. A man is cutting his trees and by accident they fall on some one's head and kill him; or a man is shooting at the butts, and by accident his hand shakes and his arrow kills another;[4] or one kills another in a tournament which is lawfully held because it is held by the king's command[5]—in these cases there is no felony, though there is liability to a civil action of trespass. With regard to the plea of self-defence it was laid down in Edward III.'s reign that the man must not use force unless he can escape in no other way. "At the gaol delivery at Newgate before Knivet and Lodel it was found by verdict that a chaplain killed a man se defendendo. And the Justices demanded to know how: and the jury said that the deceased pursued him with a stick and struck him; and the accused struck him again so that he died; and they said further that the accused could have fled from his assailant if he had wished. And the Justices adjudged him to be a felon, and said that he was bound to flee as far as he could to save his life."[6] Such force might be used not only in the strict defence of one's own person, but also in the defence of one's master's person.[7] We

[1] Stephen, H.C.L. iii 76, 77, citing Foster, Discourse of Homicide 288, 289; it should be noted, however, that Hale, P.C. i 471, said that the proper course was for the jury to find the facts specially in such cases, "et sic per infortunium or se defendendo," "because the court must judge upon the special matter whether it be per infortunium or se defendendo, and the jury is only to find the fact, and leave the judgment thereupon to the court."

[2] P. and M. ii 483.

[3] Y.B. 11 Hy. VII. Pasch. pl. 14 *per* Fineux, C.J.

[4] Y.B. 6 Ed. IV. Mich. pl. 18; cp. below 373-374.

[5] Y.B. 11 Hy. VII. Pasch. pl. 14.

[6] 43 Ass. pl. 31; Y.B. 2 Hy. IV. Mich. pl. 40; Fitz., Ab. *Corone* pl. 284, 286; cp. Bracton's Note Book case 1216; Select Pleas of the Crown (S.S.) pl. 70.

[7] 26 Ass. pl. 23; Y.B. 21 Hy. VII. Mich. pl. 50.

have seen that in Edward III.'s reign it would probably have been a good defence if the killing had been done to prevent the commission of such offences as robbery, arson, or burglary; and that certain cases of killing on such occasions were declared to be justifiable by a statute of Henry VIII.'s reign.[1]

Homicide which was neither justifiable, nor by misadventure, nor se defendendo was felonious. But it was obvious that such felonious homicide might be of very various shades of moral guilt. It might be the result of carelessness, and that carelessness might be of very various degrees; or it might be deliberate and intentional —the result of "malicia præcogitata."[2] This expression "malice aforethought" gradually came to be the expression used to describe the worst form of felonious homicide; and, from the latter part of the fourteenth century, homicide of this kind came to be known by the name of murder; while later, felonious homicide, which is not murder, came to be known as homicide by chance-medley, and, later still, as manslaughter.[3]

The history of the term "*murdrum*" is curious. Germanic peoples treat more severely, under the head of *morth*, certain forms of secret homicide. The word itself implies concealment, and both the word and the thing lived on under the name *murdrum*.[4] As Maitland has pointed out, Glanvil treats *murdrum*, or secret homicide, differently from open and intentional killing.[5] But by that time the legislation of William I. had given a new technical meaning to the term. As we have seen, the hundred must pay a murder fine whenever a dead body was found within its limits which could not be proved to be that of an Englishman, and the delinquent was not produced, or natural cause of death proved. Murder, therefore, came to mean that secret killing for which a murder fine was payable.[6] When, in 1340,[7] the murder fine was abolished, the term was released from its former technical meaning, and seems soon to have reverted to what was its earliest and perhaps had always been its popular meaning—the most serious form of homicide. But by that time the most serious form

[1] Above 312.

[2] The expression is used in Fitz., Ab. *Corone* pl. 284 (1330).

[3] Staunford, whose book on the pleas of the crown was published in 1560, contrasts (i 10) "homicide par chance medley," and "homicide par voy de murder;" Coke, writing a little later, uses the term "manslaughter" in its modern sense. It would appear from the Oxford English Dictionary that the word was already in use as a popular term; but that it was coming into use as a legal term during the latter half of the sixteenth century; Lambard, Eirenarcha ii vii (1581) is cited as saying, "Using manslaughter as a sort of Felonie that comprehendeth under it all manner of Felonious homicide whatsoever;" and it seems to have been used in this sense by the legislation as early as 1547, see 1 Edward VI. c. 15 § 6.

[4] Stephen, H.C.L. iii 25-27; P. and M. ii 484.

[5] P. and M. ii 484 n. 5, citing Glanvil xiv 3.

[6] Vol. i 15.

[7] 14 Edward III. st. 1 c. 4.

of homicide was not concealed as opposed to open killing, but killing with malice aforethought. Murder then was applied to felonious killing; and more especially to killing with malice aforethought.[1] But the growing precision which was coming to be attached to misadventure and self-defence on the one side, and to malice aforethought on the other, caused it to be necessary to distinguish further between the various forms of felonious homicide. This necessity was recognized just after the close of this period by the statutes which excluded from the benefit of clergy killing by malice aforethought, but left other forms of felonious homicide still clergyable.[2] Thus we get the line drawn between murder and the manslaughter of later law. The further elaboration of this distinction does not here concern us. It has been the work of several succeeding centuries.[3]

It was recognized from an early period that to constitute homicide there must be a voluntary act directly causing the death. Thus a doctor, whose patient died within three days after he had begun to treat him, could not be said to be guilty of felonious homicide.[4] Similarly it must be shown that the death was sufficiently connected with the act. At an early date the rule was laid down that if death ensued within a year and a day sufficient connection would be presumed.[5] Perhaps this period was connected with the fact that it was the length of time within which the relatives of the murdered man were able to bring their appeal. An injury to a child not yet born is not murder;[6] nor, in spite of a little authority to the contrary, is a frustrated attempt to murder.[7] It is only by express statutory enactment that such an attempt has been made felony.[8] It was settled during this period that the person who intentionally took his own life was guilty of felony, in spite of Bracton's doubts.[9] Probably, as Maitland says, the practice of always exacting a forfeiture of goods in such cases determined the question. Such forfeiture was the usual accompaniment of felony. But the severity of the law was

[1] So quickly did the new meaning of the term become popular that in 1348, Y.B. 21 Ed. III. Hil. pl. 23, the judges stated that before the year 1267 a man who committed murder in self-defence or by misadventure was hanged, referring to the Statute of Marlborough, 1267 (52 Henry III. c. 25), which stated that killing by misadventure was not to be judged "murdrum;" cp. Hale, P.C. i 425; Stephen H.C.L. iii 42.

[2] 12 Henry VII. c. 7 (Petit Treason); 23 Henry VIII. c. 1 § 3, "wilful murder by malice prepensed."

[3] See Bk. iv Pt. II. c. 5.

[4] Fitz., Ab. *Corone* pl. 163 (1330).

[5] Ibid pl. 303 (1330); Hale points out, P.C. i 426, that "the title of the lord by escheat to avoid mesne incumbrances relates to the stroke given, and not only to the death."

[6] Ibid pl. 263; 3 Ass. pl. 2; 22 Ass. pl. 94—either because he has not been baptized and has no name, or because he "nunquam fuit in rerum natura."

[7] As to this see below 373.

[8] 24, 25 Victoria c. 100 § 11.

[9] Fitz., Ab. *Corone* pl. 301; P. and M. ii 486 n. 6 for the earlier law.

relaxed in the case of the man who was of unsound mind,[1] or the man who slew himself by misadventure.[2] In later law the freedom with which juries found "temporary insanity" has rendered the crime of very infrequent occurrence.[3]

Rape.

Rape from the earliest times was remedied by the appeal of the injured woman; and it may perhaps in early days have comprehended abduction as well as *violentus concubitus.*[4] From the time of the Conquest onwards the two things tended to fall apart; and rape became the name for the more serious offence.[5] If prosecuted by the woman by way of appeal it was a felony, and the penalty was loss of limb; but the appeal might be compromised, and sometimes was compromised, on the basis of a marriage.[6] If the woman brought no appeal and the ravisher was indicted, the crime was not regarded as a felony, and could be expiated by fine and imprisonment.[7] The Statute of Westminster I.[8] lengthened the period within which the woman could bring her appeal to forty days, and increased the punishment if the guilty person was indicted. The Statute of Westminster II.[9] made the offence in all cases a felony; and it was after this period that its essentials were clearly defined.[10] The precision of that definition has caused the necessity in later law for the enactment of many statutes dealing with such offences as abduction and forcible marriage.

Mayhem.

Mayhem was an injury to the person that amounted to the deprivation of some member that was useful for the purposes of fighting.[11] Like rape, it could be prosecuted by an appeal of

[1] Fitz., Ab. *Corone* pl. 412 (1315), in this case the goods were confiscated; pl. 244 (1349) they were not.

[2] Ibid pl. 304.

[3] Kenny, Criminal Law 113, 114.

[4] P. and M. ii 488, 489; for a curious precedent of such an appeal see Novæ Narrationes ff. 71, 72.

[5] Bracton f. 148, "Item excipere potest et dicere quod non abstulit ei pucillagium suum;" Bracton, it would seem (f. 147), would have restricted it to violent intercourse with a virgin.

[6] Ibid 148, "Cum igitur mulier habeat electionem, et spreto judicio petat ipsum in virum, conceditur ei ex gratia regis, ob favorem matrimonii;" P. and M. ii 489 n. 7; Y.B. 30, 31 Ed. I. (R.S.) 500; The Eyre of Kent (S.S.) i 134-135.

[7] Northumberland Assize Rolls (Surt. Soc.) 92, 94, 329, cited P. and M. ii 490 n. 1.

[8] 3 Edward I. st. 1 c. 13.

[9] 13 Edward I. st. 1 c. 34; for the connection of this statute with that of 1275 see P. and M. ii 490 n. 2.

[10] Hale, P.C. i 628.

[11] Bracton f. 145b; Fitz., Ab. *Corone* pl. 458 (citing H. 8 Ed. IV. 21).

felony; but unlike rape it never became an indictable felony. The result was that it gradually dropped out of the list of felonies with the disuse of appeals.[1] We have seen that in such cases Britton recommended complainants to bring the action of trespass rather than the appeal.[2] Appeals were, however, sometimes brought in this period; and it was for the judges to decide, either by personal inspection[3] or by medical evidence,[4] whether the injury amounted to a mayhem. But as a rule proceedings for trespass were taken, with the result that "till late in the seventeenth century the most violent crimes against the person were treated as misdemeanours punishable with fine and imprisonment."[5] Even in this period the laxity of the law occasioned one piece of special legislation against certain gross forms of injury.[6]

The number and variety of the precedents of writs of trespass in the Register show us how extensive was the use made of it. Insults, beating, wounding, ill-treatmunt such as to endanger life, and "alia enormia," are the common allegations.[7] Another common complaint is of imprisonment till a ransom is paid,[8] till an oath is given not to sue for the trespass,[9] or till some claim is released.[10] Less common complaints are of the abduction of a wife,[11] apprentice,[12] or monk;[13] of a dogbite;[14] of attempts to poison,[15] waylay, or kill;[16] ill-treatment by a gaoler of a prisoner;[17] even a contempt of court.[18] Moreover, there are many other precedents of causes of action founded partly upon wrongs to the person, partly upon wrongs to property—cattle have been driven off, tenants threatened, and the land cannot be cultivated.[19]

These writs of trespass are a striking testimony to the narrowness of the criminal law. They show us that the interposition of the council was needed to supply its defects, quite as much as the interposition of the Chancery was needed to supply the defects of the civil law. It is true that trespass had its

[1] Vol. ii 361.
[2] Ibid.
[3] Fitz., Ab. *Corone* pl. 63, 74.
[4] Ibid 209.
[5] Stephen, H.C.L. iii 109.
[6] Vol. ii 451; for the later statute law see Stephen, H.C.L. iii 112, 113; Bk. iv Pt. I. cc. 2 and 7.
[7] See e.g. the Register f. 93, "Quare vi et armis in ipsum A apud N insultum fecit, et ipsum verberavit, vulneravit, imprisonavit, et male tractavit, et alia enormia, etc.;" App. Ib (5) (6) (7).
[8] Ibid f. 93.
[9] Ibid f. 95b.
[10] Ibid f. 93.
[11] Ibid f. 97.
[12] Ibid f. 109.
[13] Ibid f. 99.
[14] Ibid f. 97.
[15] Ibid f. 102.
[16] Ibid f. 102.
[17] Ibid ff. 100, 100b.
[18] Ibid ff. 95, 95b, the marginal note runs, "De quodam brevi de prohibitione in luto projecto et pedibus conculcato;" for the development of the law as to such contempts see below 391-394.
[19] Ibid f. 94b.

criminal side. Trespassers could be prosecuted, if presented at the tourn or before the king's judges; and the trespasses which were so prosecuted became the common law misdemeanours of our later criminal law.[1] But as early as Edward II.'s reign the civil aspect of trespass was gaining ground;[2] and we have seen that in this period more reliance was placed upon the action of the injured individual than upon the presentment of a jury.[3] The weakness of the executive, the decay of the old communal system of presentment in the tourn and leet, the ease with which juries were corrupted or terrorized, caused the criminal aspect of trespass to dwindle in importance, and prevented any important development in the law as to crimes under the degree of felony.[4] A large gap was thus left in the criminal law which in later times will be filled by the creation of many statutory misdemeanours.[5] Without the aid of the legislature it would have been impossible to win back to the field of criminal law the territory which, in this period, had been annexed by the law of tort. Even these statutory misdemeanours retain many traces of the days when crime and tort were not clearly separated. They recall the double nature—criminal and civil—of the old writs of trespass.[6]

We must now turn to the various wrongs to property recognized by the law. But before we can understand their nature, we must first deal with the principles of the law as to the possession and ownership of chattels; for it is in connection with this branch of the law of crime and tort that the earliest developments of these principles were made, and it is on these principles that this branch of the law depends.

§ 6. Possession and Ownership of Chattels

The origins of our modern law as to the possession and ownership of chattels must be sought in the history of the personal actions, just as the origins of our modern law as to the possession and ownership of land must be sought in the history of the real actions. In the case both of chattels and land the development of the mediæval law on this subject has been

[1] The gradual way in which the term "misdemeanour" became the technical term for crimes under the degree of felony can be seen in the Oxford English Dictionary. It was clearly not used in this way till well on in the sixteenth century.

[2] "Although 'with force and arms' be contained in the writ, she does not expect to recover damages for that, but rather for the trespass done to her," *per* Brabazon, C.J., Y.B. 4 Ed. II. (S.S.) 29, cited H.L.R. xxix 389.

[3] Vol. ii 453-454.

[4] Below 389-390.

[5] Vol. ii 365; below 390; Bk. iv Pt. I. cc. 2 and 7.

[6] Professor Kenny, Criminal Law, at p. 99 says, "A prosecution for misdemeanour is hardly distinguishable from an action for tort in which the king is plaintiff, and which aims at punishment and not at damages."

shaped by these two sets of actions; and it is therefore dominated by the accidents of their evolution. And, just as in the case of land we can see at the end of the mediæval period a new action of trespass—the action of ejectment—which will replace the real actions and create our modern law as to the possession and ownership of land; so, in the case of chattels, we can see, also at the end of the mediæval period, the beginnings of another offshoot of trespass—the action of trover and conversion of our modern law—the development and working of which will make important additions to the law as to the possession and ownership of chattels. In this section I shall begin by tracing the development of the older personal actions which protected the possession or ownership of chattels, and the origins of the modern action of trover and conversion. I shall then say something of the mediæval theory of the possession and ownership of chattels which resulted from the development of these actions.

The Development of the Personal Actions

In the twelfth century the remedies of the dispossessed owner of a chattel were essentially similar to those which he had in Anglo-Saxon times.[1] No new royal remedies, such as had been invented to protect the seisin of the freeholder, had come to the aid of the possessor of a chattel. As in the Anglo-Saxon period, therefore, we must distinguish the case where the owner involuntarily lost possession from the case where he voluntarily parted with it. This distinction runs all through the law of this period, because it is the foundation of two very different sets of remedies; and our modern law, having been shaped by these remedies, still bears the marks of this distinction. I shall therefore deal (1) with the case of involuntary loss of possession; (2) with the case of voluntary parting with possession; and (3) with the origins of the modern action of trover and conversion. That action will, in the following period, to a great extent supersede the older actions, and to some extent blur the sharpness of the mediæval distinction between the involuntary loss of and the voluntary parting with possession.

(1) *Involuntary loss of possession.*

When Glanvil and even when Bracton wrote, theft and the remedies for its prevention were the starting-point of the law. The man who has been deprived of his goods should follow the trail. The thief, if captured "hand-having" or "back-bearing," might

[1] Vol. ii 110-114.

be executed without being allowed to defend himself.[1] If such a summary measure was not possible, two courses were open to the man who had lost his goods. Either (i) he might bring the appeals of robbery[2] or larceny (called respectively by Bracton the *actio vi bonorum raptorum* and *actio furti*)[3] against the person whom he had found in possession of his goods; or (ii) he might omit the charge of larceny and claim the goods as *res adiratæ*, i.e. as his goods which have gone from his possession against his will.[4]

(i) If the owner brought his appeal the appellee might, as under the old practice, either prove that the thing was his by showing, e.g. that he had bought it, or that it had always been his; or he might vouch to warranty; or he might admit the appellor's title, give up the goods, and confine himself to proving that he came honestly by them.[5] It is clear, therefore, that the appeal was a remedy available against any one who was in possession of the goods, whether he came by them honestly or not; and that the result of this proceeding might be to give the appellor the goods—not merely damages.[6] In fact, as I have said, up to 1529[7] this was the only proceeding known to the law which had this result. It is for this reason that Bracton's identification of the *actio furti* with the appeal of larceny was mistaken; for the *actio furti* was a purely penal action.[8] It could be brought, not necessarily by the owner, but by the person who had an interest in the safety of the goods. Therefore it was open to bailees;[9] and we shall see that the fact that it was thus identified with an action which was open to bailees may have had something to do with fixing the position of the bailee in later law.[10]

(ii) Bracton tells us the owner may omit the words of felony and charge the defendant with being in the possession of his *res adiratæ*. A person who has elected this remedy may, if he likes, abandon it and proceed by appeal of larceny; but the converse

[1] Bracton ff. 137, 150b; Britton i 56; Sel. Pleas of the Crown (S.S.) pl. 173; Northumberland Assize Rolls (Surt. Soc.) 70; cp. Borough Customs (S.S.) i 72, 73; ii xxi, xxii.

[2] It is probably the appeal of robbery that is historically the most important, as it seems to have been more especially the precursor of trespass, see the authorities cited by Mr. Bordwell, H.L.R. xxix 507-508.

[3] Bracton and Azo (S.S.) 182.

[4] Bracton f. 150, "Cum autem sit qui sequatur possit ab initio agere civiliter vel criminaliter utrum voluerit: poterit enim rem suam petere ut adiratam per testimonium proborum virorum, et sic consequi rem suam quamvis furatam. Et si ille qui seistus fuerit in hoc ei non obtemperaverit, poterit accrescere et petere eam ut furatam (sed non e contrario) et dicere quod ille qui tenet latro est;" Bracton's Note Book case 824 gives a good example of the procedure; cp. Britton i 55-66; see vol. ii 366 n. 8 for the derivation of the word "adirata."

[5] P. and M. ii 161-163; Bracton f. 151.

[6] See Eyre of Kent (S.S.) i 109, 142-143 for cases where goods were thus recovered.

[7] 21 Henry VIII. c. 11; vol. ii 361.

[8] Institutes iv 6. 18.

[9] Ibid iv 1. 13-17.

[10] Below 340-341.

course cannot be pursued, because, though you may go from the lower to the higher remedy, you cannot go from the higher to the lower. We can see from a case reported in Bracton's Note Book that the gist of such an action is the wrongful detention after a request by the owner for delivery.[1] The same thing clearly appears from the count in such an action which is contained in the Novæ Narrationes.[2] "W., who is here, showeth, etc., that whereas he had as his own a horse of such a colour and worth so much, on such a day and year and in such a place the horse was lost to him, and he went seeking him from one place to another, and caused him to be demanded in fair and market, and he of his horse could not be certified, nor could he hear, till on such a day he came and found his horse in the custody of W. of E., who is there, and in the custody of the same W. in the same vill, and he (the plaintiff) told him (the defendant) how that the horse had gone from him, and of this he brought sufficient proofs to prove the said horse to be his before the bailiffs and the people of the vill, and prayed him to deliver over the horse to him, and this he was not willing to do nor is he now willing to do, to the wrong and damages of the said W. 20s." Ames says that we have no instance of such an action being brought in the royal courts.[3] Doubtless the small value of most of the things so sought to be recovered would cause the majority of such actions to be brought in the local courts. But a note in the Year Book of 21, 22 Edward I.[4] would seem to show that some information about the action was considered to be useful to the practitioners in the royal courts. "Note," it is said, "that where a thing belonging to a man is lost, he may count that he (the finder) tortiously detains it, etc., and tortiously for this, that whereas he lost the said thing on such a day, etc., he (the loser) on such a day, etc., and found it in the house of such an one and told him, etc., and prayed him to restore the thing, but that he would not restore it, etc., to his damage, etc.; and if he will, etc. In this case the demandant must prove by his law by his own hand the twelfth, that he lost the thing."

It is clear that this action, just like the appeal of larceny, lay against any one who detained the goods, and that the result of the action was to give the plaintiff the goods which he claimed as

[1] Case 824, "Editha de Wackfordia . . . dixit quod Wilelmus Nutach . . . *injuste detinuit* ei tres porcos qui ei fuerunt addirati, et inde produxit sectam quod porci sui fuerunt et ei porcellati et postea addirati;" William denies the charge; thereon Edith goes out and takes counsel, and having returned, counts against William as a thief; see Y.B. 17 Ed. III. (R.S.) 214 for what is possibly another instance of this procedure; Liber Mem. de Bernewelle 88, 89 gives an account of a similar proceeding in 1274, in which an inquest was taken as to the title.

[2] ff. 65b, 66.

[3] Essays A.A.L.H. iii 439.

[4] At pp. 466-468.

his own, or their value.[1] We should note, however, that the plaintiff does not necessarily recover the thing. He may be obliged to content himself with its value. Bracton expressly says that in actions to recover a movable the defendant is bound to restore alternatively the thing or its price; and that if the plaintiff names no value the action fails.[2] It is no doubt true that the circumstances under which the appeal or the action for *res adiratæ* was brought, in practice ensured the return of the chattels in specie; but even if his words do not apply to the appeal of larceny, there seems no reason why they should not apply to this action for *res adiratæ* as well as to the action of detinue.[3] However that may be, Bracton's words show that when he wrote there was no real action for movables; and therefore, as Maitland has pointed out, we see one of the roots of our modern distinction between realty and personalty.[4] We also see the origin of that which in later times came to be known as a "sale by operation of law."[5]

Such, then, were the old remedies for an involuntary loss of possession. It was inevitable that they should decay and finally change their shape with the development of the common law. The history of this process I shall consider under the following heads: (i) The appeals of robbery and larceny and the action of trespass; (ii) The action for *res adiratæ* and the action of detinue; and (iii) Legal doctrines resulting from the development of these actions.

(i) The appeal was, as I have said, a criminal prosecution. As the idea grew up that to constitute a crime there must be some sort of a *mens rea* on the part of the accused, it came to look unjust to accuse a man of theft merely because he happened to be in possession of goods to which another had a better right.[6] Moreover, as we have seen,[7] the technical difficulties in the way

[1] Ames, Essays A.A.L.H. iii 437-438; Ames thinks that a plaintiff could only formally demand his *res* as *adirata* in the court, and that on refusal he could bring the appeal; in other words, that the proceeding to recover a *res* as *adirata* was in the nature of a formal request, not of a contested action; but the precedent from Y.B. 20, 21 Ed. I. looks as if it was a regular action.

[2] f. 102b, "Si quis rem mobilem vindicaverit ex quacumque causa ablatam vel commodatam, debet in actione sua definire precium et sic proponere actionem suam . . . alioquin non valebit rei mobilis vindicatio, precio non apposito;" cp. Y.BB. 14, 15 Ed. III. (R.S.) 30; 1 Hy. V. Hil. pl. 4; and for the rule in modern law see Peters v. Heyward (1624) Cro. Jec. 682; Donald v. Suckling (1866) L.R. 1 Q.B. at p. 601.

[3] The complaint might be, "Conqueror quod talis mihi injuste detinet *vel robbavit* talem rem tanti precii," f. 102b; but cp. P. and M. ii 173 n. 1.

[4] P. and M. ii 173.

[5] See ex pte. Drake (1877) 5 C.D. at p. 871, *Jessel*, M.R., said, "The theory of the judgment in an action of detinue is that it is a kind of involuntary sale of the plaintiff's goods to the defendant. The plaintiff wants to get his goods back, and the court gives him the next best thing, that is, the value of the goods."

[6] Vol. ii 259, 359, 452; below 373-374. [7] Vol. ii 198, 256-257.

of an appeal caused it to be a risky remedy. Though the appellor, if successful, might get the goods, many things might happen to prevent this result. If there had been no fresh pursuit; if the thief had not been captured by the appellor or one of his company; if the goods were not found in the possession of the thief; if for any reason, e.g. the suicide of the thief or his abjuration, he was not convicted as a result of the appeal—in all these cases the appeal failed, and the king got the goods in the event of the thief being subsequently convicted of felony as the result of an indictment.[1] Consequently the place of the appeal was taken by the semi-criminal action of trespass *de bonis asportatis*. Britton,[2] as we have seen, recommended this action to be brought rather than an appeal. But we should note that this action differed from the appeal both in its scope and in its consequences.[3] It differed in its scope because the action could be brought, not against any one in possession of the goods, but only against the actual person who had taken them out of the possession of the plaintiff.[4] It differed in its consequences because the plaintiff if successful got, not the thing taken, but only damages.[5] Although, therefore, trespass was a convenient action compared with the appeal, if we look at the speediness and efficiency of its process, it was very much inferior to the appeal in the variety of persons who might be attacked by it, and in the completeness of the remedy which might be thereby obtained. In 1489 Hussey and Fairfax agreed that, "appeal is for recovery of one's goods and affirms property continually in the party, but it is otherwise of trespass, for that is not for recovery of his goods but for damages for the goods. And I have learnt that if one take my goods and another take the goods from him I shall have appeal against the second felon; but it is otherwise of trespass."[6] It was thus

[1] The special difficulties in the way of the appeal of larceny are summed up and illustrated from the Y.BB. by Ames in H.L.R. xi 279-281; and cp. Hale, P.C. i 539-540; for some of the illustrations there cited see Fitz., Ab. *Corone* pl. 162, 318, 319, 379, 392; in The Eyre of Kent (S.S.) i 84 Mutford, J., thus states the law: "All stolen goods are forfeit to the king, except the thief be shortly afterwards convicted;" and the judges were angry when a royal bailiff gave up stolen cows to the owner, on what they considered to be inadequate proof of ownership, ibid 109.

[2] i 123.

[3] P. and M. ii 165-167.

[4] Y.BB. 2 Ed. IV. Pasch. pl. 9, "Si le cas soit que jeo baille biens a un F a garder a mon œps, et F eux done a un G, jeo voile bien que jeo n'avera trespass versus G, car il avait loial possession de eux per reason del bailment, et per son don le property est vesté en le donee," *per* Choke; 13 Ed. IV. Trin. pl. 7; 4 Hy. VII. Pasch. pl. 1, *per* Hussey and Fairfax; so too if A takes B's goods, and C takes the same goods from A, B cannot sue C in trespass, Y.B. 21 Ed. IV. Hil. pl. 6 (p. 74).

[5] See Y.B. 19 Ed. III. (R.S.) 124 for the measure of damages recoverable in this action as compared with the action of detinue *per* Moubray; substantially the modern rule seems to be laid down, see Balme v. Hutton (1833) 9 Bing. at p. 477.

[6] Y.B. 4 Hy. VII. Pasch. pl. 1 (p. 5); the translation is from Pollock and Wright, Possession 156, where other authorities pointing out the differences between the appeal and trespass will be found; see also H.L.R. xxix 387.

a personal action for damages against a wrongdoer which took the place of an action which, though essentially criminal in its nature, possessed in the range of persons who might be attacked, and sometimes in the character of the remedy which might be obtained, two of the marks of a real action.

(ii) The action for *res adiratæ* probably fell out of use with the disuse of the appeal. What took its place? This is a difficult question to answer. The received view is that the owner who had involuntarily lost possession of his property had, after the decay of the older actions, no action save the action of trespass, which, as we have seen, lay only against the actual taker; and that it was not till the invention of the actions of detinue and trespass sur trover that he got any available action against a person who was in possession of his goods, but who was not an actual trespasser. The action of detinue, it is thought, lay originally only against a bailee, i.e. it was available only to an owner who had voluntarily parted with the possession of his goods to another.[1] Some words of Littleton in 1455, describing a count in trover as a "new found haliday," are taken to mean that the action of detinue was practically confined before that date to actions against bailees.[2]

It is, however, difficult to believe that the rights of owners of goods were so curtailed during the fourteenth century. No doubt the action of detinue was an action which was used chiefly against bailees; and some dicta perhaps would seem to imply that the action lay only against a bailee. But such dicta, if spoken in course of an action of detinue sur bailment, would not negative a possibility of bringing such an action against some one other than a bailee.[3] We want a precise statement to the effect that

[1] Holmes, Common Law 169, "We find it laid down in the Year Books that, if I deliver goods to a bailee to keep for me, and he sells or gives them to a stranger, the property is vested in the stranger by the gift, and I cannot maintain trespass against him; but that I have a good remedy against the bailee by writ of detinue for his failure to return the goods. These cases have been understood, and it would seem on the whole rightly, not merely to deny trespass to the bailor, but any action whatever;" P. and M. ii 174, "Despite the generality of the writ (of detinue), the bailor of a chattel can never bring this action against any one save his bailee, or those who represent his bailee by testate or intestate succession."

[2] Y.B. 33 Hy. VI. Trin. pl. 12 (p. 27), "*Littleton* dit secrettement que cest declaracion *per inventionem* est un *new found haliday:* car l'ancien declaracioun et entrie ad ete tout temps en tiel cas coment les chartres [the things in dispute in the case] *ad manus et possessionem defendentis devenerunt* generalment, et ne monstra coment: mes s'il fuit sur un bailment perenter le pleintif et defendant auter sera."

[3] See Y.B. 16 Ed. II. f. 490—Detinue against B, alleging a bailment to D, and that after D's death the thing came to B's hands. The action failed; but the ground of failure was, not that there could be no action of detinue except against a bailee, but that, the plaintiff having brought detinue sur bailment, the defendant must be made privy to the bailee; see especially *Aldeburgh's* argument where he says, "Jeo pose que vous eussez counte que a tort nous detenons l'escript, et pur ceo a tort que l'escript devynt en nostre main, votre counte ne vaudra rien *donque quant vous*

the action lies against a bailee and no one else. To borrow the precise language of the pleaders, we must have, not only an averment that an action of detinue lies only against a bailee, but also an averment that it lies only against a baillee "sans ceo que" it lies against any one else. It is just this averment which it is difficult to find.[1] There are in fact some cases which would seem to show that the action of detinue was sometimes allowed to do part of the work of the old action for *res adiratæ*, and that the owner who had involuntarily parted with the possession of his goods might sometimes sue one who was not the actual taker.

The gist of the old action for *res adiratæ* was the fact that the plaintiff had lost his goods, that they had come into the hands of the defendant, and that the defendant on request refused to give them up. Just as in the action of detinue, it is the wrongful detention which is the gist of the action.[2] This is brought out in the precedent from the Novæ Narrationes, the Year Book of Edward I., and the case from Bracton's Note Book which I have referred to above.[3] It is not therefore inconceivable that this old action should have been superseded by a form of detinue, just as the appeal was superseded by trespass. Besides the case from the Year Book of Edward II.'s reign which I have cited above,[4] the following cases would seem to show that a form of detinue was recognized which enabled a man, whose property had gone from him involuntarily, to recover it from the persons

commencez vostre counte du baille fait a certein persone, et puis . . . *vous ne pursuez mye sur le baille come fesaunt nous prive a celui a qui vous baillastes eins nous faisez tout estrange a cel bayl.*" Thus the possibility of suing on a devenerunt ad manus—"devynt en nostra main"—which Littleton said was the old manner of pleading—is clearly recognized at this early date.

[1] It is true that in Y.B. 6 Hy. VII. Mich. pl. 4 (p. 9) *Brian*, arguing as to the nullity of a gift of goods by one out of possession, says, "Cesty de que les biens sont pris ne poit avoir accion de detinue . . . car en Detinue on doit mettre que le defendant vient a eux loyalment;" but he admits that he can "s'il voile porter accion de Detinue et count sur trover ou bailment pur ce que ce n'est traversable;" and cp. Y.B. 12 Ed. IV. Mich. pl. 2 the same judge says, "Si jeo baille biens a un home a garder icy en queconque mains les biens deviendra il est chargeable a moy . . . mes si cestui a qui les biens sont bailles baille les biens a un auter cest seconde baile n'est chargeable forsque durant le possession, etc., car s'il baille ouster il est discharge;" so Y.B. 43 Ed. III. Mich. pl. 11 (p. 29) *Belknap's* words clearly refer to a case where there has been a bailment—he is not thinking of a case where there has been none. The fact that for some time when there had been a bailment the bailor could only sue the bailee in detinue sur bailment (below 348-349) is consistent with the fact that there may have been another form of detinue open to a person whose goods had left his possession involuntarily. The only direct statement I have seen that no action lies at common law against a person to whose hands goods had come, "because he was not party nor privy to the delivery," comes from a plaintiff's bill in Chancery (1413-1417), Select Cases in Chancery (S.S.) 113-114; but we cannot always trust the statements in these ex parte allegations.

[2] Y.B. 20, 21 Ed. I. (R.S.) 192; cp. Y.B. 9 Hy. V. Mich. pl. 22 *per* Cottesmore; and 32 Hy. VI. Mich. pl. 20; below 327 n. 2.

[3] Above 321.

[4] Above 324 n. 3.

into whose hands it had come. In 1313, in an action of detinue of charters, *Toudeby*, arguing for the defendant, objected that the plaintiff had not shown that he had bailed the charter to him, or that he (the defendant) received it by bailment from any of the plaintiff's ancestors. To this *Scrope*, the plaintiff's counsel, replied, "If you disseise me and carry off my charters and I bring my writ and demand these same charters, it is then no answer to my writ to say that I did not bail you any charter. Likewise if you should find my charters you would answer for the detinue."[1] In 1329[2] it was stated that the owner of a charter might recover against one who had "found it in the way and defaced it;" and it was ruled that a person who had defaced it while in his possession might be sued in trespass—though apparently he had not taken it from the plaintiff's possession. In 1343 detinue for a horse was brought against executors personally. *Grene* afterwards said, "In whatever way it (the horse) came into your possession, whether as executors, or because you took it out of the possession of some one else, or because you found it, if you detain it I shall have an action; whereupon, inasmuch as you do not answer as to the detinue, which is the principal matter of the action, judgment." The other side were driven to traverse the fact that the horse had come into their possession and the detention.[3] In 1344 there was another case in which the ground of the action was not a bailment but a devenerunt ad manus.[4] In 1371 detinue was brought for an ass.[5] The plaintiff counted that the ass strayed into the seignory of the defendant, who took the animal as an estray, that he had tendered a reasonable sum, and that the defendant had refused to deliver up the ass. Issue was taken on the sufficiency of the tender. No one seemed to suppose that detinue did not lie in such a case; and this is just such a case as would in older time have supported an action for *res adiratæ*[6]—the man had lost his property and it had come to the defendant's hands. In 1410 *Thirning* and *Hill* agreed that detinue lay against a stranger who found another's property and declined to restore it.[7]

[1] Y.B. 6 Ed. II. (S.S.) 167.

[2] Y.B. 2 Ed. III. Hil. pl. 5 *Aldeburgh* argued, "Vous poiez avoir votre *Præcipe quod reddat* (i.e. detinue) vers celui a qui vous baillastez votre chartre, et il ouster vers nous et issint votre recoverie vers nous per auter voy;" *Scrope* says, "Si vous ussez trove la chartre en le voy, jeo avera mon recoverie vers vous per le *Præcipe quod reddat;*" no one seems to deny this.

[3] Y.B. 17, 18 Ed. III. (R.S.) 514, 516.

[4] Y.B. 18 Ed. III. (R.S.) 214 seqq.

[5] Y.B. 44 Ed. III. Pasch. pl. 30.

[6] H.L.R. x 379; The Court Baron (S.S.) 144.

[7] Y.B. 11 Hy. IV. Hil. pl. 20 (p. 46), "Queconque que soit en possession de mon escript ou per bailler, ou que il trouvast en le chemin j'avera accion vers luy pur le possession et le deteiner . . . quod *Hill* concessit;" in Y.B. 9 Hy. V. Mich. pl. 22 *Cottesmore* says much the same thing; cp. also Fitz., Ab. *Briefe* pl. 644—a case of Mich. 13 Rich. II.

These cases show that detinue sur trover was known early in the fourteenth century. In fact, the "finding" was merely a common mode in which the property, which the owner had lost, got into the hands of the defendant.[1] The action (whether brought on a bailment, a devenerunt ad manus, or a finding) was not based upon the mode in which the defendant had acquired the possession, but upon the fact that he detained another person's property which had got into his hands, by finding or in some other manner. The plaintiff must of course show how the property got into the defendant's hands—by bailment, by finding, or as executor.[2] If he proved the necessary facts he recovered in detinue even though he had parted with the goods involuntarily. In Henry VI.'s reign this count in detinue—sur trover, on the finding, became common form. To allege a finding was an easy and a usual way of showing how goods had come to the defendant's hands.[3] Littleton's words probably only refer to this improvement in pleading. Coke, at any rate, seems to have attached this meaning to them.[4] They certainly do not imply that before that time detinue only lay sur bailment; for he admits in so many words that it lay on a "devenerunt ad manus et possessionem defendentis."[5] The effect of his words was perhaps greater than the effect of most casual utterances by counsel. They seem to have given authority to the growing practice of using this count in trover. Henceforward the count in trover and the count in bailment are the two great types of the action of detinue.

Thus the older remedies for an involuntary loss of possession were practically superseded by various newer remedies. If the property was stolen the owner might still bring the appeal if he cared to risk this very doubtful remedy. It was still the only remedy by which he might recover the thing itself from third persons. Otherwise the thief must be indicted, and if he were convicted the owner lost all chance of restitution or of compensation until Henry VIII.'s statute.[6] If the property

[1] Cp. Y.BB. 7 Hy. VI. Pasch. pl. 3; 9 Hy. VI. Hil. pl. 4.

[2] Brooke, Ab. *Detinue de Biens* pl. 50 (3 Hy. IV.)—detinue sur bailment; Y.B. 35 Hy. VI. Mich. pl. 33 (p. 27) *per* Wangford—trover is merely one way of pleading an action of detinue based on a devenerunt ad manus; cp. L.Q.R. xxi 46, where Sir John Salmond clearly points this out. Ames has pointed out that while in the old action for res adiratæ the plaintiff alleges that he is the finder (above 321), in detinue sur trover he alleges that the defendant found the things, Essays, A.A.L.H. iii 440; but in view of the fact that it was not the finding, but the detention that was the gist of the action, this difference would not seem to be very material.

[3] See e.g. Y.B. 12 Ed. IV. Mich. pl. 2.

[4] Isaack v. Clarke (1613) 2 Bulstr. at p. 312, "And a man may count either upon a devenerunt ad manus generally, or specially per inventionem, and one may at this day declare upon a devenerunt ad manus, but the latter (per inventionem) is the better . . . This is the most certain and better count."

[5] Above 324 n 2.

[6] Vol. ii 361.

was taken from the owner without felonious intent he could bring trespass against the taker. As against third persons into whose hands the property had come he could bring detinue either on a "devenerunt ad manus" or in trover. But by bringing these personal actions he could only get damages. The owner of goods has a real right; but it can only be enforced in a personal action for damages. He can get no specific restitution at common law.

(iii) Legal doctrines resulting from the development of these actions.

I have already called attention to one of the consequences resulting from the fact that the law gave no real action for the recovery of chattels, but only these personal actions of trespass and detinue—the consequence that it has helped the formation of the modern distinction between real and personal property.[1] Another consequence, which has coloured the whole future history of the law as to the ownership and possession of chattels, has resulted from the fact that these personal actions were delictual in character. Their delictual character has closely bound up this branch of the law with the law of tort, because it is through these personal actions in tort that it has been developed.[2] Besides these two general consequences which flowed from the development of these actions, other consequences of a more technical kind have resulted from the overlaping of these various remedies—criminal, semi-criminal, and civil—in which we can see the origins of important rules of English law.

We have seen that it might well happen that, on the same facts, an appeal, an indictment, and an action of trespass might be open to the aggrieved party. Sometimes also a plaintiff might consider that an action of detinue on a devenerunt ad manus or a finding would be better suited to the facts of his case.[3] Naturally a good deal of law of a somewhat technical kind arose from this overlapping of remedies old and new. It was the sort of subject with which the mediæval common

[1] Above 322.

[2] Maitland, Forms of Action 369—"I think we are obliged to say that the mere possessing of a movable thing by one who is not entitled to possess it is a tort done to the true owner. It would surely have been far more convenient if we could have said that the owner's action is *in rem*, that he relies merely on the right of ownership, and does not complain that the possessor, who came by the thing quite honestly, has all along been doing him a wrong. The foundation for all this was abolished by the Common Law Procedure Act of 1854 which enabled a judge to order execution to issue for the return of a chattel detained without giving the defendant the option of paying the value assessed. . . . But I think we must still say that an action whereby an owner claims his chattel is an action founded on tort."

[3] Thus in Y.B. 33 Hy. VI. Trin. pl. 12 (pp. 26-27) Prisot, C.J., and Littleton differed on the question whether trespass or detinue should be brought against a finder; cf. Ames, Essays, A.A.L.H. iii 439.

lawyers were very familiar; for the various real actions provided a parallel case of a hierarchy of actions of varying dates which were open, sometimes alternatively, and sometimes in succession, to a person claiming to be entitled to land.[1] In the case of these criminal or quasi-criminal remedies the order of superiority was chronological. The appeal was the oldest remedy. Therefore it was, as we have seen,[2] given priority to the indictment; and when this priority was taken away, it was provided that, in the case of an appeal of murder, an acquittal on an indictment should be no bar to an appeal.[3] On the other hand, trespass was a more recent remedy than an indictment; and therefore the indictment took precedence of it. It would seem too that trespass, perhaps because of its semi-criminal character, was given precedence to the action of detinue.[4]

It was the precedence of the indictment to the action of trespass that was the most rigidly insisted on, because a conviction for felony on an indictment was most advantageous to the king. Unless the king had granted to some lord the right to the chattels of felons within his manor or other area, he was the person entitled to these chattels.[5] This was the direct result of the assumption by the crown in the twelfth century of jurisdiction over all felonies. The process was nearly complete when Glanvil was writing;[6] and the claims of the crown were tacitly admitted by those who drafted Magna Carta.[7] It has been very truly said that, in the Middle Ages, the royal prerogative often appears to be simply some advantage over the subject which the law gives to the king when their rights conflict.[8] The manner in which the king asserted his claims to the goods of felons is one of the most striking instances of the truth of this saying. Some very good illustrations of this fact are afforded by the Pleas of the crown

[1] The lawyers then and later often appealed to this analogy, see e.g. Hudson v. Lee (1589) 4 Co. Rep. 43a.

[2] Vol. ii 362; it was said by counsel in 1346 that "an action of appeal" was of an "higher nature" than an action of trespass, Y.B. 20 Ed. III. (R.S.) i 432; Y.B. 12 Rich. II. 147 *per* Rickhill, *arg.*

[3] Vol. ii 362; 3 Henry VII. c. 1.

[4] In Y.B. 1, 2 Ed. II. (S.S.) 170 there is a case in which an action of detinue is adjourned because the defendant alleges that she is bringing the semi-criminal action of trespass.

[5] P. and M. ii 164.

[6] Glanvil vii 17; he expressly contrasts land with chattels from this point of view—"sin autem de alio quam rege tenuerit is qui utlagatus est vel de felonia convictus, tunc quoque omnes res suæ mobiles regis erunt. Terra quoque per unum annum remanebit in manu domini regis, elapso autem anno, terra eadem ad rectum dominum . . . vertetur;" but the process was not quite complete, for, "Præterea si de furto fuerit aliquis condemnatus res ejus mobiles et omnia catalla sua vicecomiti provinciæ remanere solent."

[7] McKechnie, Magna Carta (2nd ed.) 339-340.

[8] Hallam, Middle Ages (ed. 1860) iii 148; below 460.

heard in the Eyre of Kent in 1313-1314.[1] As we have seen, it was only if the owner made fresh pursuit, captured the thief with the goods in his possession, and convicted him as the result of the appeal, that the owner saved his goods from forfeiture.[2] So far did the claims of the crown go that, when in a quarrel about certain coins a man was killed, the king claimed the coins, and the judges took time to consider what judgment they should give.[3] It would seem that the severity of the law as to theft-bote—the retaking of one's chattels from a thief in order to favour or maintain him—was due to this cause. The owner guilty of this offence was said at one time to have been punished capitally;[4] and it is probable that we must look to these ideas for one of the roots of the modern rule that agreements which have the effect of stifling a prosecution are illegal. It is not till the beginning of the fifteenth century that we begin to hear of any mitigations of this rule in favour of goods found in the possession of a thief which were obviously not his property.[5] Even when Staunford wrote the old strict law seems to have been still in force;[6] and it was not till the seventeenth and eighteenth centuries that we hear of any substantial modifications of the crown's claims.[7]

In so far as these claims by the crown hastened the disuse of appeals, by inducing the judges to be astute to quash them, the greed of the crown had beneficial results. But it had other results which have been less beneficial. It has confused men's ideas on the subject of ownership and possession; and it is the source of two rules of our modern law of tort—the rule that if a tort amounts to a felony the injured person cannot sue for damages unless the tort-feasor has been prosecuted, and the rule that "in a civil court the death of a human being cannot be complained of as an injury."[8] Of these three consequences of

[1] The Eyre of Kent (S.S.) i 78-79, 82, 84, 89, 151-152; and for other illustrations see Fitz., Ab. *Corone* pl. 317-319, 334; in the case last cited goods bailed were forfeited.

[2] Above 323 and n. 1.

[3] The Eyre of Kent (S.S.) i 95-96.

[4] Winfield, Present Law of Abuse of Legal Procedure 117, 146-147.

[5] Y.B. 12 Rich. II. 4, "and it was said if a man pledge certain goods to another, who commits felony and is attainted, etc., the king shall not have those goods, because the property in those goods is throughout in the pledgor."

[6] Prærogative 45b.

[7] Thus Hale says, Pleas of the Crown i 251, that "at common law the king by attainder of treason was not entitled to any chattels that the party had *en autre droit;*" Hawkins, P.C. ii c. 49 § 9 says, "It seems agreed that all things whatsoever which are comprehended under the notion of a personal estate, whether they be in action or possession, which the party hath, or is entitled to in his own right, and not as executor or administrator to another, are liable to such forfeiture;" he admits, however, (§ 17) that stolen property waived is, as a rule, forfeited; he tries (§ 9 n. *a*) with very little success to impugne the correctness of Staunford's statements; it is probable that the process of modification began with terms of years limited to the felon's executors, see Cranmer's Case (1572) Dyer 309.

[8] Baker v. Bolton (1808) 1 Camp. 493 *per* Lord Ellenborough, C.J.

the manner in which the crown insisted on the preference of the indictment to the action of trespass I must at this point say a few words.

(*a*) It is probable that the crown's claims to the goods of felons was one of the causes which led the lawyers to ascribe "property" to thieves. The thief has the possession of the stolen goods; and the terms "possession" and "property" were often used convertibly in the Year Books.[1] When it is said that the thief has property in the stolen goods, all that is meant to be asserted is the obvious fact that he has possession of them. But the king continued to take and keep the goods, though the distinction between property and possession was coming to be more clearly recognized.[2] Therefore it begins to be said that because the king can acquire property in the stolen goods the thief himself must have had such property. This, as Maitland has pointed out, is, from the historical point of view, an inversion of logic, due to the gradual manner in which the distinction between possession and the right to possession (i.e. property in the modern sense of the term) has arisen.[3]

(*b*) The rule that if a tort amounts to a felony the injured party's right of action is barred does not seem to be expressly stated in the Year Books. Perhaps the judges in the Middle Ages considered it to be unnecessary to state what they would have regarded as an elementary rule of procedure. The earliest express statement of the rule occurs in the case of *Higgins v. Butcher* in 1607.[4] In that case a husband brought an action of trespass for assault on his wife from the effects of which she had died on the day following the assault. Tanfield, J., said: "If a man beats the servant of J.S. so that he dies of the battery, the master shall not have an action against the other for the battery and loss of the service, because the servant dying of the extremity of the battery, it is now become an offence to the Crown, being converted into felony, and that drowns the particular offence and private wrong offered to the master before, and his action is thereby lost;" and in this reasoning Fenner and Yelverton, J.J., concurred.

[1] In the Y.BB. the term "property" is used (1) to signify possession, Y.BB. 12 Rich. II. 4 *per* Pynchbek, C.B., 2 Ed. IV. Pasch. pl. 9, cited above 323 n. 4; or (2) to signify the thing possessed, Y.B. 1 Hy. V. Hil. pl. 4, "L'ou home demande certain chateux, et per son bref est prove que la propertie est devestue de son possession per le prisel;" or (3) to signify the right to possession, Y.B. 18 Ed. IV. Hil. pl. 5, "Si jeo baille a vous mes robes pur garder, et vous eux spendez issint qu'ils perishes, j'averai action de Detinue, car le property n'est altere;" and cp. below 356.

[2] The boroughs sometimes secured some modification of this principle by charter, see Borough Customs (S.S.) ii xli, lviii, lix.

[3] P. and M. ii 164, "One of the reasons why the thief is said to have "property" in these goods is that the king has acquired a habit of taking them and refusing to give them up;" cp. Ames, Essays A.A.L.H. iii 542-543.

[4] Yelv. 89.

It was for some time very doubtful whether, in such circumstances, the cause of action in tort was wholly lost, or whether it was only suspended. At a time when all felonies were punished by death, when all the felon's chattels were forfeited to the crown, who was not liable to his debts, and when his lands escheated to his lord, this was a purely academic question.[1] But in the sixteenth century it was ceasing to be entirely academic. Hale[2] tells us that, as a result of statutes of 1566 and 1576,[3] a person convicted of a clergyable felony and burnt in the hand, though he forfeited all the goods belonging to him at the time of conviction, "Yet by his burning in the hand he is put into a capacity of purchasing and retaining other goods"; and that "presently upon his burning in the hand he ought to be restored to the possession of his lands, and from thenceforth to enjoy the profits thereof." It might, therefore, be a very practical question whether the injured person had lost his right of action in tort, or whether that right of action was only suspended.

There seems at first to have been a considerable body of opinion in favour of the view expressed in *Higgins v. Butcher*[4] that the right of action was wholly lost; and there was something to be said for it. It was clear that the appeal and the action of trespass were alternative remedies;[5] and it was clear also that, except in the case of the appeal of murder, acquittal or conviction upon an indictment was a bar to an appeal.[6] Was it not reasonable, therefore, to hold that trespass and indictment were alternative remedies, so that a conviction or an acquittal upon an indictment would bar an action for trespass, just as it would bar an appeal, other than an appeal of murder? This would seem to have been somewhat the line taken by the dissenting judgment of Jones, J., in *Markham v. Cobb*;[7] and there was clearly a widespread opinion that this was the law. Among the proposals for the reform of the law put forward in 1653[8] was a proposal that, "It shall not be lawful for any person who shall have goods feloniously taken away, to bring any civil action for the recovery thereof, or for damage for the same, before he have proceeded criminally, with effect, against the offenders; but that he may bring his action after such effectual prosecution."

[1] In 1621 a bill passed the House of Commons which provided that the estates of attainted persons should be liable to their debts, but it failed to pass the House of Lords, Hist. MSS. Com. 3rd Rep. App. 25.

[2] P.C. ii 387-389.

[3] 8 Elizabeth c. 4; 18 Elizabeth c. 7.

[4] Yelv. 89.

[5] Above 329; Markham v. Cobb (1625) W. Jones at pp. 148, 149.

[6] Vol. ii 363; Hale, P.C. i 249, 251.

[7] W. Jones at pp. 149, 150.

[8] Somers Tracts vi. 239.

Similarly, in the set of proposals for the amendment of the law, published in 1657 by William Shepherd, under the title of "England's Balme," it is said, "that it is an hard law that no recompense is given to a man's wife or children for killing of him, whereas for the beating or wounding of him while he was alive, he should have had recompense for the wrong."[1] Buller, J., in 1791 considered that the question was open;[2] and Lord Eldon in 1810 seems to have been in favour of the view that the right of action was wholly lost.[3] Nevertheless, from the first quarter of the seventeenth century, there had been a series of cases in which the contrary view was taken. In 1625 in the case of *Markham v. Cobb*[4] trespass was brought for breaking into the house of the plaintiff and the taking of £3000. The defendant pleaded that he had been convicted of that felony, and that he had had his clergy. Doderidge, J., held that the action lay, and that the conviction for felony did not take away the action for trespass. To this opinion he adhered after hearing a second argument; and Whitlock, J., agreed with him. This decision was followed in 1652 by Rolle, C.J., in the exactly parallel case of *Dawes v. Coveneigh*;[5] these decisions seem to be approved by Hale in his Pleas of the Crown;[6] and it is now settled law that the fact that a tort to property[7] or to the person[8] amounts to felony does not destroy, but only suspends, the right of action. In such cases the plaintiff's action is stayed till the felony has been prosecuted.[9]

(*c*) The broad rule laid down by Lord Ellenborough at nisi prius in 1808 to the effect that "in a civil court the death of a human being cannot be complained of as an injury,"[10] admits of two perfectly distinct applications. Firstly, it covers part of the ground covered by the maxim *actio personalis moritur cum persona* —the representative of the deceased victim of a tort, which has caused his (the victim's) death, cannot sue in his representative capacity.[11] Secondly, it makes it impossible for a plaintiff to sue a defendant for a wrong committed by the defendant to the plaintiff, when that wrong consists in damage causing the death

[1] At p. 148.
[2] Master v. 4, Miller, T.R. at pp. 332-333.
[3] Cox v. Paxton, 17 Ves. 329; he remarked, at p. 331, "those who obtained this Act of Parliament, making the embezzlement of their clerks felony, are much surprised at the consequence, that they cannot recover their money."
[4] Latch 144; S. C. W. Jones 147.
[5] Style, 346.
[6] P.C. i 546-547.
[7] Wells v. Abrahams (1872) L.R. 7 Q.B. 554; cp. Midland Insurance Co. v. Smith (1881) 6 Q.B.D. 561.
[8] Smith v. Selwyn [1914] 3 K.B. 98.
[9] Ibid.
[10] Baker v. Bolton (1808) 1 Camp. 493.
[11] For this maxim and its history see below 576-583, 584.

of a person in the continuance of whose life the plaintiff had an interest. It is clear that the second application of the principle has nothing to do with the maxim *actio personalis*, etc., as both plaintiff and defendant are still alive. The death is simply an element in the cause of action. It is with the second of these applications of the principle that I am here concerned. At this point I am only concerned with the first in so far as it has affected the development of the broad principle which we are considering.

It is probable that the origin of the second application of this principle is to be found in the rule, which has just been discussed, that, if a cause of action in tort disclosed a felony, the right of action in tort was affected.[1] This was suggested in *Osborn v. Gillett*,[2] and no other suggestion has ever been made. But we have seen that it is now settled that this rule only suspends, but does not destroy, the right of action in tort. It would seem to follow, therefore, that the mere fact that a felonious tort to the person results in death should not debar a person who has suffered loss by the death from suing in tort for such damages as he can prove that he has sustained, provided that the felony has been prosecuted. *A fortiori* he ought to be able to sue if the tortious act causing death does not amount to a felony. In 1668, in the case of *Cooper v. Witham*, Levinz, the reporter, seems to think that this was the logical result of the cases of *Markham v. Cobb* and *Dawes v. Coveneigh*.[3] But logic has been disregarded; and in cases where the tort results in death a right of action is denied. What, then, is the reason for a rule which, even on technical grounds, seems to be illogical? The absence of all authority between the seventeenth-century cases and Lord Ellenborough's dictum in *Baker v. Bolton* makes it impossible to give a certain answer to this question. I would suggest tentatively that the two following causes may have helped its growth:

(1) In the great majority of cases in which death ensues as a result of a tort felony has been committed. In a large number of cases also the persons damaged by the tort are the deceased's near relations. I would suggest, therefore, that the rule based upon the maxim *actio personalis*, etc., became confused with the rule based upon the fact that the tortious act was a felony. It is true that in *Higgins v. Butcher*[4] the Court seems to have been perfectly well aware of the distinction between the husband's

[1] Above 331-333.

[2] (1873) L.R. 8 Exch. at p. 96.

[3] 1 Lev. 247: "Twysden said, that an action did not lie for the master for beating of his servant to death, for that he lost his service; for the party ought to be indicted for it, as is Yelv. 90. But see Latch 144, *Markham* against *Cobb*, Style 346, 347, *Dawes* against *Coveneigh*, that trespass lies for a felonious taking money after the party has been convicted and burnt in the hand."

[4] (1607) Yelv. 89.

claim to sue as representing his wife and his claim to sue in his own right. The first claim was disallowed, and then the Court decided that the second must also be disallowed for the reasons set out above.[1] But we can see signs of this confusion in the passage from Shepherd's book cited above.[2] It is equally apparent in the preamble to the Fatal Accidents Act, 1848,[3] which recites that "No action is now maintainable against a person who by his wrongful acts may have caused the death of another person." But Bramwell, B., pointed out in *Osborn v. Gillett*[4] that the general statement contained in that preamble must be cut down by reference to the subject-matter of the statute, and that it must be taken to refer to the survivorship of the cause of action which the deceased would have had if he had survived; and in this view Lord Alverstone concurred in *Clark v. General Omnibus Co.*[5] I should like to suggest, therefore, that when Lord Ellenborough gave his ruling in *Baker v. Bolton* he was the victim of the same confusion of ideas. As we have seen, his statement, like the statement in the preamble to the Fatal Accidents Act, 1848, is so wide that it covers these two wholly distinct rules of law. (2) This wide principle was laid down by Lord Ellenborough at nisi prius. It was not the considered judgment of the court; and it was uttered at a time when there was very considerable doubt whether the fact that a civil wrong was also a felony destroyed or only suspended the right of action in tort.[6]

We have seen that the criminal appeal of murder was in practice so used that it afforded a partial mitigation of this rule of law.[7] But criminal appeals are now things of the past.[8] At the same time it is now well recognized that the rule based on the maxim *actio personalis moritur cum persona* is quite distinct from this rule.[9] All the evidence points to the fact that the rule is based ultimately on the principle that no action will lie for a tort which is also a felony till the felon has been prosecuted—a principle which, as we have seen, is ultimately traceable to the preference which, in the pecuniary interest of the crown, was given to the indictment over the action of trespass.[10] If the rule rests on this basis it follows that it cannot be supported in the form in which it was propounded by Lord Ellenborough. On the contrary there is no reason why a civil action should not lie for a tort which results in death, provided that, if a felony has been committed, the felon is first prosecuted.

[1] Above 331.
[2] Above 333.
[3] 9 and 10 Victoria c. 93.
[4] (1873) L.R. 8 Exch. at p. 95.
[5] [1906] 2 K.B. at pp. 658-659.
[6] Above 332-333.
[7] Vol. ii 363.
[8] Ibid 364.
[9] The Admiralty Commissioners v. S.S. Amerika [1917] A.C. at pp. 43, 44.
[10] Above 329-330.

The rule as laid down by Lord Ellenborough is obviously unjust;[1] it is technically unsound because, as we have seen, it is based upon a misreading of legal history;[2] and yet it is the law of England to-day, for it was upheld by the House of Lords in 1917 in the case of *The Amerika*.[3] The House of Lords attempted to justify its decision by an appeal to legal history. But the display of historical knowledge which was made on this occasion is an object lesson both in the dangers of hastily acquiring such knowledge for a special occasion, and in the consequences of the neglect of this branch of legal learning.[4] It is not the only case in our books which shows that the historical continuity of English law demands a thorough knowledge of its history if those "apices juris," upon which the courts are sometimes called to adjudicate, are to be correctly determined.

But we must return from this modern chapter of accidents to the Middle Ages.

(2) *Voluntary parting with possession.*

The general term used to express any voluntary parting with possession is the term "bailment." This term covers many different kinds of transactions—loans for use or consumption, pledges, hirings, and deliveries for many special purposes, such as safe custody or carriage. Any person to whom an owner delivers possession of his goods for a special purpose is a bailee;[5] and, if we except the case of such persons as servants,[6] anyone who has the de facto control of another's goods is in possession of them. We have seen that the bailee, being in possession, was the person who could pursue all the remedies of an owner, such as the appeals of robbery or larceny or the action for *res adiratæ*. Indeed, the character of these remedies almost necessitated their being brought by the person, who, being in possession, knew at once of his loss. Nevertheless the bailee was never regarded as the owner. "If," as Maitland has said,[7] "the bailee had been conceived as owner, and the bailor's action as purely contractual, the bailor could never have become the owner by insensible degrees and without definite legislation. But we know that this happened; we know that before the end of the Middle Ages the

[1] Osborn v. Gillett (1873) L.R. 8 Exch. at pp. 93-99 *per* Lord Bramwell; Pollock, Torts (10th ed.) 67-68.

[2] Above 334.

[3] Admiralty Commissioners v. S.S. Amerika [1917] A.C. 38.

[4] For some criticism of that case see App. VIII.; it is clear that the rule owes nothing to Roman law, as is admitted in The Amerika [1917] A.C. at p. 44; indeed, the Roman rule was less harsh than the English rule, and was based on social conditions very different from those prevailing in a modern state, see L.Q.R. xxxii 436-437.

[5] P. and M. ii 168, 169.

[6] Below 363-365.

[7] P. and M. ii 176.

bailor is owner, has 'the general property' in the thing, and no Act of Parliament has given him this." The bailor then, is the owner. But the conception of ownership is not as yet the conception which is familiar to modern lawyers. As we have seen, the definite outline of such conceptions as ownership and obligation is the product of a mature legal system; and the outline becomes more and more blurred as we go back to primitive times.[1] And so, although the bailor was the owner, the sum of his rights as owner was originally his better right as against the bailee to get possession; for this better right to get possession was the only form of ownership which the mediæval common law recognized. He could assert this right by the action of detinue in which he claimed "his" things detained by the bailee; but this was the extent of his rights. Till he had recovered possession his position was like that of the disseised owner of land.[2] He was deprived of most of the fruits and consequences of ownership, while the bailee in possession was, as against all the world except his bailor, treated as owner.[3] English law starting from that common basis of Germanic custom of which there are traces in the Anglo-Saxon period,[4] gave all the rights of ownership—rights of action and powers of disposition—to the bailee; and it still retains a substantial link with this primitive idea. A bailee can, and always could, sue one who has taken goods from, or damaged goods in his possession, as though he were owner, and the defendant cannot set up the *jus tertii* of the bailor unless he claims through it.[5]

It is for this reason that originally the liability of the bailee to the bailor was absolute. The bailee, having been given the position of owner as regards third parties, it was only fair that he should be held liable to the bailor;[6] and in the primitive

[1] Vol. ii 79. [2] Above 92.

[3] Y.B. 11 Hy. IV. Mich. pl. 39—this was an action of replevin against a defendant who pleaded that the cattle distrained belonged to another; and it was suggested that, as this was the case, the plaintiff should not have said the cattle were his, but that they were in his "custodia;" to this suggestion Thirning, C.J., said "Ne pledes pluis de cest matter, car vers vous il ad property;" cp. Bordwell, Property in Chattels H.L.R. xxix 502, 737. On the other hand, in Y.B. 11 Hy. IV. Mich. pl. 2, where a villein brought Trespass, a plea that the goods were another's, i.e. his owner's, was upheld—but this was probably due to the fact that he was a villein; as to this see Y.B. 18, 19 Ed. III. (R.S.) 500-502; Select Pleas of the Crown (S.S.) pl. 138 p. 90; for another explanation of this case see below 346.

[4] Vol. ii 79-80. [5] The Winkfield [1902] P. 42.

[6] Holmes, Common Law 166-167; "that the bailor has no action against any person other than his bailee, no action against one who takes the thing from his bailee, no action against one to whom the bailee has sold or bailed the thing—this is a proposition which we nowhere find stated in all its breadth. No English judge or text writer hands down to us any such maxim as *Mobilia non habent sequelam*. Nevertheless we can hardly doubt that this is the starting point of our common law," P. and M. ii 171; I think that this is true in spite of Mr. Bordwell's reasons, H.L.R. xxix 505-508; it seems to me that Mr. Bordwell underrates the amount of continuity existing between the ideas of older law and the new law laid down by the

period, when these rules originated, we must not expect to find a nice discrimination between degrees of liability. Liability and strict liability are all one. Thus the position of the bailor and the bailee with respect to the chattels bailed was governed by principles which were both logical and definite. The extent of the bailee's powers was compensated for by the extent of his liability to the bailor: the meagreness of the bailor's powers was compensated for by denying to the bailee any defence against his bailor's action for the return of the goods.

Glanvil is perhaps the latest authority in which we can catch a glimpse of this state of the law. He does not, it is true, say that if the goods are stolen the bailee alone can sue. But he does say that the appeal of larceny could not be brought by the bailor against the bailee, even if the bailee misused the goods, because the bailor had delivered the goods to the bailee;[1] and he is clearly very uncertain whether the bailor had any rights against the bailee if the bailee misused the goods. Since it is quite clear that under the older law a bailee could bring the appeals of robbery or larceny, and that such appeals were brought by bailees in the period when Glanvil wrote and afterwards,[2] it is possible that it was only the bailee who could bring these appeals if the goods were stolen from him; and this rule could be justified on Roman principles; for we may remember that the Roman law, though as a rule it refused possession to bailees, originally allowed them and not the owner to bring the actio furti,[3] if and when they were liable over to their bailor. That English law in the time of Glanvil followed the same rules, is the more probable in that Glanvil states definitely that the bailee is absolutely liable. He makes it quite clear that no care, no accident, no vis major excused him if the goods were lost or damaged while in his custody;[4] and his statement of the law is

king's court in the thirteenth century; in fact, the mixture of the old ideas and the new seems to me to have given rise to a conception of the bailee's position which owes something both to the primitive period and to the thirteenth century ideas, below 342-343.

[1] "Præterea si quis usque ad certum locum rem suam, vel usque ad certum tempus alii commodaverit, et is qui eam ita recepit ultra illum locum vel illud tempus eadem re usus fuerit, an quantum id emendare debeat, vel sub qua probatione vel cujus idem sit judicandum quero. A furto enim omni modo excusatur per hoc quod initium habuerit suæ detentionis per dominum illus rei," Glanvil x 13; but an appeal would lie if and when the bailee ceased to be a bailee, Select Pleas of the Crown (S.S.) pl. 126.

[2] Select Civil Pleas (S.S.) pl. 8 (1200); Select Pleas of the Crown (S.S.) pl. 105 p. 60 (1212); below 339-340.

[3] Justinian, Instit. iv 1. 13-17; vol. ii 279.

[4] "Sin autem res ipsa interierit vel perdita fuerit, quocunque modo in custodia tua, omni modo teneris ad rationabile pretium mihi restituendum," Glanvil x 13; cp. P. and M. ii 169.

borne out by a case of the year 1200.[1] We have seen that Glanvil's book was inspired by the influence of the legal renaissance of the twelfth century.[2] But, just as when dealing with the older restraints upon the alienation of land, he preserves the memory of rules which, when he wrote, were on the point of becoming obsolete;[3] so, in dealing with the position of bailor and bailee, he adheres very closely to the old legal conceptions which the new Roman learning was rapidly undermining.

The new ideas introduced by this learning tended to dislocate both parts of this primitive scheme for the regulation of the rights of bailor and bailee. As we have seen, these new ideas operated in England both quickly and powerfully through the royal central courts.[4] Two ideas in particular exercised a disturbing influence upon the two parts of this scheme. The first was the influence of the Roman conception of *dominium* which, as we have seen,[5] early made its influence felt in the land law. The second was the influence, which filtered through the canon law, that liability should be based on some fault.[6] Both these ideas were beginning to make their influence felt at the beginning of the thirteenth century. Let us look at their effects.

(i) *The influence of the Roman conception of dominium.*

In the thirteenth century there are numerous instances of appeals of robbery or larceny brought by bailees, in which the bailee alleged, not that the goods were his, but that they were in his *custodia*.[7] The bailor is regarded as the owner; and it is probable that both Bracton,[8] and Britton[9] considered that either

[1] Select Civil Pleas (S.S.) pl. 8, where it was held that the fact that a bailee was robbed of the goods, for which robbery he is bringing an appeal, was no defence.

[2] Vol. ii 203. [3] Above 73-75. [4] Vol. ii 146, 176-177.

[5] Above 77. [6] Vol. ii 258-259, 451-452.

[7] "Omnia ista habuit ipse in custodia per balliam matris suæ, et de custodia sua ea robata fuerunt," Select Pleas of the Crown (S.S.) pl. 105, p. 60 (1212); Bracton's Note Book, cases 723 (1225), 824 (1233); Bracton f. 146a; later it seems to have been immaterial whether a bailee alleged custody of or property in the goods, Y.BB. 48 Ed. III. Mich. pl. 8; 11 Hy. IV. Mich. pl. 39; in Y.B. 11 Hy. IV. Mich. pl. 46, p. 24, it was said that the Chancery clerks would not grant a writ for goods "in custodia," for which reason doubtless the phrase dropped out; see H.L.R. xxix 731.

[8] "Et non refert utrum res, quæ ita subtracta fuit, extiterit illius appellantis propria, vel alterius, dum tamen de custodia sua," f. 151a; it may be noted, however, that at f. 103b Bracton seems to be trying to distinguish larceny from robbery in this respect—"Sciendum quod actio furti sive condictio domino rei competat contra furem et ejus successorem et contra quemlibet detentorem. Actio vi bonorum raptorum de rebus mobilibus vi ablatis sive robbatis datur domino rerum vel de cujus custodia surreptæ sunt, et qui intravit in solutionem erga dominum suum, ita quod ejus intersit agere;" as to this see Maitland's comment, Bracton and Azo (S.S.) 182; Bracton's treatment of robbery and larceny at f. 157 does not lead me to think that he really meant to put great stress on the distinction between robbery and larceny; on this matter I do not agree with Mr. Bordwell, H.L.R. xxix 507-508, 748-749, though I think he is probably right in thinking that it is the appeal of robbery which is the prototype of trespass.

[9] Bk. i c. 16 (Nichols i 55), "Let careful enquiry also be made concerning

the bailor by virtue of his ownership, or the bailee by virtue of his custodia, had the right to bring these appeals. The Mirror of Justices also seems to say that this is the law.[1] But these statements are not quite precise; and in particular, they leave it uncertain whether the bailor could sue if the goods were taken from the custody of the bailee.[2] It may, however, be remembered that Bracton identifies the appeal of larceny with the actio furti;[3] and, following Justinian's Institutes,[4] he perhaps meant to give the bailor the right to elect whether he would sue his bailee or the thief. However that may be, it is clear from his and from other contemporary statements that the rights of the bailor were gaining recognition; and, as we shall see, it is probable that this recognition had something to do with the permission, given to the bailor in the first half of the fourteenth century, to bring trespass against a third person who had taken the goods from the bailee.[5] But when the custodia of the bailee was thus distinguished from the ownership of the bailor, it was inevitable that the right of the bailee to sue as if he were owner should begin to appear somewhat anomalous. Therefore the bailee usually alleged in these appeals that he was accountable to the owner;[6] and Bracton perhaps thought that this allegation was necessary.[7] Here again he was perhaps influenced by his identification of the appeal of larceny with the actio furti; for Roman law gave the actio furti

robbers, thieves and such like offenders; as to whom our will is that if those who rob or steal the goods of another amounting to twelve pence or more, be freshly pursued for the same by the owners, or by those out of whose custody the things were stolen or robbed . . . they shall forthwith be taken, etc."

[1] "In these actions (the appeals of robbery and larceny) two rights may be concerned—the right of possession, as is the case where a thing is robbed or stolen from the possession of one who had no right of property in it (for instance where the thing has been lent, bailed, or let); and the right of property, as is the case where the thing is stolen or robbed from the possession of one to whom the property in it belongs," the Mirror (S.S.) 57, cited H.L.R. xxix 509.

[2] "These statements are brief and unsatisfactory. They were incidental to an account of criminal proceedings, and lack the precision they would have had if they had been part of an exposition of the law of bailments. They allow the appeals to the owner and to the one having custody, and leave us to speculate as to whether the owner whose goods were taken from the custody of another was allowed them or not," Bordwell, H.L.R. xxix 510.

[3] Above 338.

[4] Instit. IV. 1. 16.

[5] Below 348.

[6] Bracton f. 103b cited above 339 n. 8; we see such an allegation in Select Pleas of the Crown (S.S.) pl. 126 p. 81—"ipse (the appelor) intravit in solucionem versus dominum suum pro predicto firmaculo et anulo."

[7] "Appellat quandoque quis alium de alterius rebus, quam de suis propriis, ut si ab aliquo robbatæ fuerint res aliquæ, quas habuerit in custodia sua, de rebus domini sui vel alterius, et quo casu, oportet eum docere, quod sua intersit appellare, quia alias appellum non habebit, non magis quam de morte alicujus extraneæ personæ. . . . De re vero aliena docere oportet, quod de custodia sua robbata fuerit simul cum rebus suis propriis, vel sine, et quod ipse custos appellans intravit in solutionem de tanta pecunia erga dominum suum," f. 146; Bracton's Note Book case 1664; above n. 6; H.L.R. xxix 731; P. and M. ii 170 and n. 5.

to the bailee because he was answerable over.[1] Thus the view that the bailee's responsibility over to the bailor was the reason for his right to sue was introduced into the law; and that it rapidly became the view universally accepted both in England and abroad is illustrated by the fact that Beaumanoir, whose book was written slightly later in the thirteenth century than that of Bracton, and under much the same set of influences, adopted a similar explanation of the bailee's right of action.[2]

(ii) *The influence of the Roman ideas of liability.*

Under this same influence Bracton was prepared to modify the extent of the bailee's responsibility.[3] "It is plain," says Maitland,[4] "that already in his day English lawyers were becoming familiar with the notion that bailees need not be absolutely responsible for the return of the chattels bailed to them, and that some bailees should perhaps be absolved if they have attained a certain standard of diligence." In this he was followed by Britton. Britton would excuse a bailee if the goods were lost "by accident of fire, water, robbery, or larceny," for, "against such accidents no one ought to answer for things lost, unless they happened by his fault or negligence;"[5] and effect was given to this view in 1299 when robbery was allowed as a good defence to a bailee in an action of detinue.[6] But, as we have seen, these Roman ideas ceased in the course of the fourteenth century to influence English law.[7] Therefore Bracton's rules did not in the Middle Ages become part of English law; and, in spite of Chief Justice Holt's efforts,[8] they are not even now thoroughly acclimatized.

There are indeed, some indications in the Year Books of the fourteenth and fifteenth centuries of a tendency to introduce some modifications of the bailee's liability. In a doubtful case of 1315, which has been very variously interpreted, there is

[1] Instit. iv 1. 13-17; Bracton and Azo (S.S.) 183.

[2] Holmes, Common Law 167; for its speedy adoption in England see below 342.

[3] "Qui pro usu vestimentorum auri vel argenti, vel alterius ornamenti, vel jumenti mercedem dederit, vel promiserit, talis ab eo desideratur custodia, qualem diligentissimus pater familias suis rebus adhibet, quam si præstiterit, et rem aliquo casu amiserit, ad eam restituendum non tenebitur," f. 62b; with regard to a person "qui utendum accipit" he says, f. 99b, "ad vim majorem vel casus fortuitos non tenetur quis nisi culpa sua interuenerit," though in a preceding sentence he has apparently made the commodatarius almost if not quite absolutely liable, see vol. ii 275; the pledgee is under the same liability as "is qui utendum accipit," ibid.; while the depositee is not even liable for his negligence; as to the confusion of ideas in this passage see vol. ii 275-276; and Maitland's note, Bracton and Azo (S.S.) 147, there cited.

[4] P. and M. ii 170.

[5] Bk. i c. xxix, Nichols i 157.

[6] Brinkburn Cartulary p. 105, cited P. and M. ii 170.

[7] Vol. ii 287.

[8] Coggs v. Bernard (1703) 2 Ld. Raym. 909.

possibly a hint that the fact that the goods had been stolen might be a good defence to the bailee;[1] and the law was so stated in 1355.[2] In 1339 counsel said in argument that the fact that the goods bailed were burned together with the house in which they were stored would be a good defence to the bailor's action.[3] In 1432 Cotesmore, J., ruled that, "If I grant goods to a man to keep to my use, if the goods by his default are stolen he is accountable to me for the goods; but if he is robbed of the goods he is excusable by law."[4] Perhaps in these cases the judges were trying to apply to the liability of the bailee the view that a man, though liable for his own acts which wrongfully cause damage to another, is not liable for the acts of others or acts beyond his control.[5] But these attempts thus to modify the liability of the bailee never materialised. Though, as we shall see, the recognition of the bailor's dominium led to the development of his rights against third persons who had taken the goods,[6] no substantial diminution was made in the extent of the bailee's liability. The reason for this is to be found in the elaboration of the new theory as to the ground of that liability which had emerged in the time of Bracton.

We have seen that Bracton distinguished the "custodia" of the bailee from the "dominium" of the bailor, and put forward the accountability of the bailee to the bailor as an explanation of the bailee's right of action.[7] We have seen also that this same explanation was given by Beaumanoir.[8] That it found speedy acceptance is clear from the fact that it was hinted at in a plea in the court of the Honour of Broughton in 1258.[9] It involved a departure from the older conceptions but not a very serious departure. According to this view the right of the bailee to sue as if he were owner is taken for granted—the old rules of law which gave him that position were too strongly rooted to be overthrown. But these old rules were rationalized by assigning his liability over to the bailor as the reason for his right to sue. Maitland's dictum that between the rules that the

[1] Y.B. 8 Ed. II. 275; Fitz., Ab. *Detinue* pl. 59; see Holmes, Common Law 176; Beale, Carrier's Liability, Essays, A.A.L.H. iii 157; Bordwell, H.L.R. xxix 736-737; if Fitzherbert's account of the matter is correct and issue was taken on the theft, it would seem that theft was a good defence to an action of detinue against the bailee; the Y.B. says that the plea being that the goods were delivered in a locked chest, and the replication being that they were delivered out of the chest, issue was taken on that; it is not unlikely, as Mr. Bordwell says, that the Y.B. represents a tentative pleading (below 635, 637), and that we have in Fitzherbert's account the issue really taken.

[2] 29 Ass. 163 pl. 28; Beale, op. cit. Essays A.A.L.H. iii 152 n. 2.

[3] Y.B. 12, 13 Ed. III. (R.S.) 246.

[4] Y.B. 10 Hy. VI. Mich. pl. 69.

[5] Below 378, 380.

[6] Below 348-349.

[7] Above 340-341.

[8] Above 341.

[9] Select Pleas in Manorial Courts (S.S.) 65-66.

bailee could sue third parties because he was liable to his bailor, and that he was liable to his bailor because he could sue third parties, there was no logical priority,[1] exactly represents the view which was beginning to prevail in Bracton's day. In a sense too it represented older law; but, while in the older law the greater stress was laid on the bailee's possession, in the newer scheme the greater stress was laid on his liability over. In the older law his right to sue third parties by virtue of his possession was the premise, and his liability was the conclusion. From the days of Bracton onwards the situation tends to be reversed. His liability over tends to become the premise from which his right to sue third parties is deduced as the conclusion.

The bailee's liability over is very clearly put forward as the reason for his right to sue in an action of replevin heard in the Eyre of Kent of 1313-1314.[2] It is the generally accepted theory in the Year Books of the fourteenth,[3] fifteenth,[4] and early sixteenth[5] centuries; and it appears in Croke's report of *Southcote v. Bennet*[6] in 1601 as one of the reasons for the decision of the court. "It is not any plea in a detinue," say Gawdy and Clench, JJ., "to say that he was robbed . . . ; for he hath his remedy over by trespass or appeal to have them again." Having been thus adopted into the modern common law, this view of the reason for the bailee's right to sue has been repeated by many lawyers of the seventeenth, eighteenth, and nineteenth centuries.[7] The consequences of this theory were also accepted. It followed that if the bailee was not able to sue he was not liable to his bailor. Thus if the goods were damaged by the king's enemies[8] or by the act of God,[9] he clearly had no

[1] "Perhaps we come nearest to historical truth if we say that between the two old rules there was no logical priority. The bailee had the action because he was liable and was liable because he had the action," P. and M. ii 170.

[2] "*Passeley*.—By your writ you asserted that the property of the beasts was in yourself, and now, by your counting, you say that the beasts are not yours, but one N.'s. Judgment whether you can now avow property in another's beasts. *Stonore*.—The beasts are in our custody, so that we should be liable if they were lost and they do not deny that they took them. Judgment, etc. *Ashby*.—You first affirmed that the property was in yourself, and now you affirm that it is in someone else. . . . He was told to say something else."

[3] Last note.

[4] Y.BB. 11 Hy. IV. Mich. pl. 46 (p. 24) *per* Hankford, Hill and Culpeper; Holmes, Common Law 170 n. 2.

[5] Y.B. 21 Hy. VII. Hil. pl. 23.

[6] Cro. Eliza. 815; see also the MS. report of this case printed in H.L.R. xiii 43; at p. 44 the fact that the defendants had a remedy over is alleged as a reason for allowing the plaintiff to sue.

[7] Bk. iv. Pt. II. c. 2 § 2.

[8] Y.B. 33 Hy. VI. Hil. pl. 3; for a full account of this case, which is discussed in most of the subsequent cases on this point, see Holmes, Common Law 176-177.

[9] Thus in Y.B. 33 Hy. VI. Hil. pl. 3 it seems to have been admitted that an accidental fire or a sudden tempest would have been an excuse—such damage was

remedy over; and therefore it was held that he was not liable to the bailor for damage due to these causes. The same result followed if it was through the action of the bailor that the goods were not returned or damaged.[1] Conversely, if by reason of a special contract with his bailor or for any other reason he was not liable over, it seems to have been the opinion of Brian and Littleton that he could not sue a person who had taken the goods from his possession.[2]

Thus a more or less logical theory was evolved which accounted both for the bailee's right to sue as if he were owner, and his absolute or almost absolute responsibility to his bailor. As that absolute responsibility was thus accounted for, the attempts to limit it which we see in the earlier law cease in the fifteenth century. And the law as thus settled was authoritatively laid down by Coke in *Southcote's Case* in 1601. "If A delivers goods to B generally to be kept by him, and B accepts them without having anything for it, if the goods are stolen from him, yet he shall be charged in *detinue:* for to be kept and kept safe are all one."[3]

The question now arises, what is the historical truth as to the basis of the bailee's rights to sue and as to his liability over? Is it true to say that the bailee could sue as if he were owner merely because he is liable over? Or is it true to say that he is liable

not the act of the defendant, therefore not attributable to him; cp. Holmes, Common Law 200, 201-202—as Holmes says, this principle was not peculiar to bailees; it is, as we shall see, a consequence of the mediæval principle of liability for tort, below 380.

[1] Y.B. 11 Hy. IV. Mich. pl. 46 (p. 24) *per* Hankford, Hill and Culpeper; cp. H.L.R. xxix 738.

[2] Fitz., Ab. *Barre* pl. 130—"Detinu. Le defendant monstre coment le bailment fuit fait a gard al jeopardy le pleintif, et monstre coment un tiel aver pris les biens de luy. *Brian* bon ple, pur ceo que le bayle ne puit aver accion pur recoverer damages quar il ne recoverait damages mes pour le charge que il ad ouster al baylour, et il n'est charge ouster icy, mes auter est de general baylle;" this is Y.B. 3 Hy. VII. Trin. pl. 16; in the Y.B. Brian's words are not quite so definite as Fitzherbert makes them; but that this was the idea held by both Brian and Littleton appears clearly enough in Y.B. 9 Ed. IV. Mich. pl. 9, of which a good account is given H.L.R. xxix 741-742; it was a question of "colour" (see below 639)—would a bailment to the predecessor of a prior support an action by the successor? Brian said no—"si jeo baille certain biens a un home pur garder, si soient emportes, puis il avera bref de Trespass pur le possession, car il est chargeable ouster a moy. Mes si biens bailles a un Prior soient emportes, le successor n'avera action, car il n'est chargeable, issint a nul mischief," and Littleton said practically the same thing.

[3] 4 Co. Rep. 85b; it should be noted that Dodderidge, counsel for the defendant, argued that it was only when a bailee took goods at his peril that he was bound if they were stolen; on the other hand, Pynde, counsel for the plaintiff, argued that, this being a bailment to keep safely, was equivalent to taking the goods at the peril of the bailee, and it was only if a bailee took goods to keep as his own goods that he would be excused, H.L.R. xiii 43, 44; clearly Coke adopted and even went further than Pynde's argument when he ruled that "to be kept and kept safe are all one;" that Coke was right in treating the words "kept safe" as merely the common form of alleging the bailee's duty is shown by Ross v. Hill (1846) 2 C.B. 877; cp. Street, Foundations of Legal Liability ii 264 n. 5.

over because, being in possession, he has, like any other possessor, the rights of an owner as against all save his bailor? In other words, is the basis of his rights to sue his liability over, or his possession? This problem was to a large extent academic in the Middle Ages. We have seen that practically the only cases in which the bailee was not liable over were cases in which he could sue no one. If the goods were damaged by the king's enemies or by the act of God clearly there was no one to sue.[1] It was only when a case arose in which a third person damaged the goods in the bailee's possession, under circumstances which did not make the bailee liable to the bailor, that the question of the basis of his liability could arise in a practical form. If in such a case, we base his right to sue on his liability over, he clearly has no right of action against the wrongdoer. On the other hand, if we base his rights of action on his possession he has a right of action. The possibility of such a case arising could not easily occur till after the decision of Holt, C.J., in *Coggs v. Bernard* in 1703;[2] and we shall see that it was not for nearly two hundred years after that decision that the problem was authoritatively settled in favour of the view that the bailee's right to sue is based, not on his liability over, but on his possession.[3]

The question, however, whether this was an historically correct decision is essentially a problem of mediæval legal history; and opinions have and probably will continue to differ upon it.

In favour of the view that the bailee's right to sue should be based on his liability over the following considerations have been and can be urged: we have very little evidence that the rule that the bailor was confined to his rights against the bailee was ever the law of England. On the contrary, early in the thirteenth century, the bailor's rights of property are distinctly recognized, and the bailee's rights are based on his liability over. We cannot pray in aid those old conceptions of Germanic law because, like many other primitive ideas, they went down before the new common law which was being created in the thirteenth century. Hence, as soon as we get definite information as to the bailee's position, we find that the bailor's rights of property are recognized, and that the bailee's rights are based on his liability over. This tradition has been continuous right down to the nineteenth century;[4] and we have seen that Brian and Littleton drew the logical consequence, and held that if he were not liable over, he

[1] Above 343-344.
[2] 2 Ld. Raym. 909.
[3] The Winkfield [1902] P. 42.
[4] These considerations are ably set out by Bordwell, Property in Chattels H.L.R. xxix 501 seqq.; 731 seqq.

could not sue anyone who interfered with his possession of the goods.[1]

But, notwithstanding these reasons, I think that the evidence goes to show that the bailee's right to sue was based on his possession. It is, I think, reasonably clear from Glanvil's book that English law did start from the old conceptions of Germanic law which gave the bailee as possessor the rights and powers of the owner.[2] It is no doubt true that these old conceptions were modified as the result of the legal renaissance of the thirteenth century. But they were not wholly got rid of. Here, as in many other cases, they were transplanted and developed in a modified form. There was a modification of legal doctrine, but no absolute breach of continuity. No doubt the Roman conceptions of ownership and possession exercised a disturbing influence both in the law as to hereditaments and as to chattels. But neither in respect to hereditaments nor in respect to chattels did they succeed in ousting the old idea that seisin or possession is ownership as against all the world save as against the man with the better right. Hence it followed that the bailee, being a possessor, had the rights of a possessor and could sue by virtue of those rights. There is support for this view in the Year Books. In the case of 1409[3] already referred to, in which a villein brought trespass, one of the counsel argued that the fact that the goods were in his custody at the time of the taking entitled him to bring the action. This argument was not upheld because, I think, of the personal incapacity of the plaintiff; for in the same case Thirning, C.J., ruled that as against a stranger the bailee had property.[4] In the case of 1469, which has also been referred to, Choke and Nedham upheld, as against Brian and Littleton, the right of the bailee to sue by virtue of his possession;[5] and it is noteworthy that in Coke's report of *Southcote's Case*[6] he did not, as in *Heydon and Smith's Case*,[7] base the bailee's liability to his

[1] Above 344 n. 2. [2] Above 388-389.

[3] Y.B. 11 Hy. IV. Mich. pl. 2; above 337 n. 3; note that Rolle, Ab. *Trespass* M. 6 conjectures that this ruling was due to the fact that he was not chargeable over; but there is no hint of this in the report.

[4] Y.B. 11 Hy. IV. Mich. pl. 39.

[5] Y.B. 9 Ed. IV. Mich. pl. 9; above 344 n. 2; H.L.R. xxix 741-742; in that case Choke said, "Cest possession est sufficient, pour ce qu'il poit per cause del possession aver meintenir breve de Trespass ou appell de Robberie s'ils eussent estres emportes;" and Nedham said, "Et, Sir, quand il aver possession de les biens, par celle possession il purra maintenir action, s'il fuissent pris hors de son possession, vers chescun forsque vers cestui que droit aver;" but, later, though he granted the bailee's right to recover on the possession, he at once added the reason that he was chargeable over; but it is clear from the whole gist of his argument that he regarded the possession as the foundation of the right to sue; it may be noted that in Y.B. 21 Hy. VII. Hil. pl. 23 Fineux, C.J., though he assigns as a reason for the bailee's right to sue that he is chargeable over, yet lays stress on the principle that he "ad properte encontre chescun estranger."

[6] (1601) 4 Co. Rep. 83b. [7] (1611) 13 Co. Rep. at p. 69.

bailor upon his right to sue a third person who had taken the goods. On the contrary, he bases his liability on "his acceptance upon such delivery,"[1] i.e. upon his possession. It is true, as we shall see, that the bailor's ownership was recognized when he was allowed to bring trespass against persons who had taken the chattels from the bailee.[2] But it is significant that these extensions of the rights of the bailor were not accompanied by any relaxation of the bailee's liability. No doubt we can explain this fact by saying there was no need to relax his liability because these extensions of the bailor's rights were not made at the expense of the bailee's rights—while in possession, he still had all the rights of the owner. But this explanation clearly puts the stress on the possessory aspect of the bailee's rights.

In fact, the view that the bailee can sue by virtue of his possession is in harmony with the root principles of the common law as to the position of a possessor—whether finder, wrongdoer, or bailee; while the view that the bailee can sue only by virtue of liability over can only be harmonized with those root principles by treating a bailee differently from any other possessor. It is true that a continuous chain of authority can be cited for the view that the bailee's rights rest upon his liability over; but this is largely discounted by the fact that these statements were made in cases in which it was immaterial which view of his position was adopted. They are to a large extent dicta, and cannot therefore weigh against the generally accepted principles of the common law as to the legal rights of a possessor.

Therefore I regard the view which bases the bailee's rights to sue upon his liability over as the product of the disturbing influence exercised by Roman law in the thirteenth century. And in support of this view it is possible to point to the analogy of the land law. Just as ideas drawn from the Roman conceptions of *dominium* and *possessio* gave rise to the unfortunate distinction between the seisin of the freeholder and the possession of the termor,[3] so these same conceptions, coupled with Roman conceptions of liability, obscured the fact that the rights of the bailee depended on his possession. In spite, therefore, of the reasons which have been alleged to the contrary, I must subscribe to Holmes' argument that the bailee's position depends, not on his liability over, but on his possession. We shall see in a later volume[4] that, with the help of Holmes' argument, this, the true historical view, has prevailed.

But we must return to the Middle Ages. Though the new ideas of the thirteenth century did not in any way diminish the

[1] 4 Co. Rep. at f. 83b; cp. also Arnold v. Jefferson (1697) 1 Ld. Raym. at p. 276.
[2] Below 348. [3] Above 213. [4] Bk. iv Pt. II. c. 2 § 2.

powers of the bailee as possessor, they did help to add to the rights of the bailor as owner. We have seen that Bracton allowed him to bring the appeals of robbery or larceny;[1] and it is by no means unlikely, as Mr. Bordwell has suggested, that the rules thus laid down with respect to the criminal appeals helped to induce the judges in the fourteenth century to allow him rights of action against other persons besides his bailee.[2] It is certainly significant that the action which was the first to be extended to the bailor was that semi-criminal action of trespass which was taking the place of the criminal appeals;[3] and that this extension was at once accepted.[4] Probably this extension took place in the first half of the fourteenth century. In Edward II.'s reign the older rule that, in case of a bailment, only the bailee could sue seems to be upheld.[5] But in 1344[6] Huse, *arguendo*, said, "A writ of trespass and a writ of appeal are given to him to whom the property belongs, and also to one out of whose possession the property is taken, because both master and servant will have an appeal in respect of the same felony;" and he was not contradicted. In 1374 it was admitted that either the bailor or the bailee could bring trespass against one who had wrongfully taken possession of the goods.[7] It is true that in later law it was laid down that the bailor could not bring trespass if the goods had been bailed for a fixed term or pledged.[8] But it is doubtful if the law was so laid down in this period. There is some ground for thinking that trespass was then regarded as a general action which was capable of remedying wrongs to personal rights, wrongs to the possessory rights of bailees, and wrongs to the proprietary rights of bailors; and that it was not till the following period that it came to be regarded as an exclusively possessory remedy.[9]

More difficulty was felt in allowing a bailor to bring detinue against persons other than his bailee in cases where there had been a bailment. The actions of debt and detinue were, so to speak, twin actions.[10] They are placed together in the register;[11]

[1] Above 339, and n. 8.
[2] H.L.R. xxix 509; above 340 n. 2.
[3] Vol. ii 360, 364-365.
[4] H.L.R. xxix 573.
[5] Y.B. 16 Ed. II. f. 490; above 324 n. 3.
[6] Y.B. 18, 19 Ed. III. (R.S.) 508. It may be noted that this extension was made in Germany in the thirteenth century, Schulte, Histoire du droit de l'Allemagne (Tr. Fournier) 471.
[7] Y.B. 48 Ed. III. Mich. pl. 8 (pp. 20, 21); this, of course, does not apply if the bailee gives the goods to another, as in that case there is no trespass, Y.BB. 2 Ed. IV. Pasch. pl. 9; 21 Hy. VII. Mich. pl. 49.
[8] Bk. iv Pt. II. c. 2 § 2.
[9] H.L.R. xxix 517-519, citing Litt. § 71, and Y.B. 12 Ed. IV. Pasch. pl. 20 *per* Choke; of course during the term the bailor could not sue the bailee, Y.B. 17 Ed. IV. Pasch. pl. 2 *per* Brian, C.J.
[10] P. and M. ii 171, 172; and cp. Y.BB. 20, 21 Ed. I. (R.S.) 138, 21, 22 Ed. I. (R.S.) 256, with Y.B. 33-35 Ed. I. (R.S.) 454; vol. ii 366.
[11] f. 139; for the writs see App. Ib. (1) (2).

and their wording is almost identical. Debt lay where the plaintiff demanded the payment of money: detinue if he asserted his right to a specific chattel. It would not be true to say that either cause of action rested upon a contract. It is true that in the Year Books this expression is sometimes used;[1] and if debt was brought upon an agreement executed on one side, or detinue was brought upon a bailment, the expression was not inappropriate. As a matter of fact, the right to the payment or the money or the conveyance of the chattel really rested either upon a grant of the defendant, or upon some provision of positive law which created such right.[2] But, though the contractual aspect of debt and detinue was gaining prominence, from the reign of Edward III. onwards, it never entirely prevailed over the older ideas. We have seen that in the case of involuntary loss of possession the owner was allowed to bring detinue based on a devenerunt ad manus or a trover.[3] It was only natural therefore that the right of the bailor to bring detinue against other persons besides the bailee should be gradually extended. He was first allowed to sue the bailee's executor;[4] and then any third person who had got possession of the goods and detained them.[5] By the reign of Edward IV. he was allowed to choose whether he would sue his bailee, or whether he would sue any third person by making use of the count in trover.[6] This extension of the bailor's rights, which gave a fuller recognition of his ownership, is as Ames has pointed out, closely analogous to the contemporary process by which the chancellor extended the rights of the cestui que use, and gave him a remedy not only against the feoffee to uses but also against many other persons in possession of the legal estate. In both cases the result was to convert a right which was originally a right *in personam* into a right which was substantially a right *in rem*.[7]

[1] Y.BB. 20, 21 Ed. I. (R.S.) 202; 17, 18 Ed. III. (R.S.) 622 pl. 42; 37 Hy. VI. Mich. pl. 18 (debt); 18 Hy. VI. Pasch. pl. 7 (p. 9) (detinue).

[2] See Y.B. 3 Ed. II. (S.S.) 191 for a good statement of this conception; vol. ii 367, 368; below 356.

[3] Above 326-327.

[4] Y.B. 16 Ed. II. f. 490; cp. Y.B. 9 Hy. VI. Hil. pl. 4. In Y.B. 11 Hy. IV. Hil. pl. 20 *Hankford* said, "Avant ces heures il ad estre en disputacion si home avera accion de detinue vers executor sur un bailler d'un fait baille al testator sans especialty ou nemy."

[5] Y.B. 11 Hy. IV. Hil. pl. 20 *Thirning* says, "Si jeo baille un chartre touchant l'enheritance d'un estranger a un home, et il baille ouster, j'averay assey bon action vers le possessor sans especialty. *Hankford.*—Jeo grant bien."

[6] Y.B. 12 Ed. IV. Mich. pl. 2 above 325 n. 1; *Brian* notes that the bailee is always liable; but that a sub-bailee or finder is only liable while in possession—much the same principle as is now applied to the original lessee and the assignee in respect of covenants running with the land.

[7] Ames, Essays A.A.L.H. iii 435; for the detailed history of this change in the case of the cestui que use see Bk. iv Pt. I. c. 2.

Thus in the case of voluntary parting with possession, just as in the case of involuntary loss of possession, the rights of the owner came to be recognized. They obtained more complete recognition through a new action, the origins of which we can discern at the close of this period.

(3) *The origins of the action of Trover and Conversion.*

At the end of this period the rights of owners out of possession were beginning to be further protected by an action of trespass on the case. This action on the case developed into the modern action of trover and conversion which, in course of time, almost superseded the action of detinue, and made considerable encroachments on the sphere of trespass.[1] In fact, the career of this action in the law of tort is very similar to the career of assumpsit in the law of contract.[2] It is true that trover did not supersede these older personal actions which redressed wrongs to the ownership and possession of chattels so completely as assumpsit superseded the older personal actions of debt and covenant; but the history of both trover and assumpsit is similar in that they both, to a large extent, took their place, and both helped thereby to simplify and generalize the law.

The need for this new action originated in the defects of the action of detinue. That action lay if the defendant refused to deliver at the plaintiff's request. As we have seen, it was not the bailment but the detention that was the gist of the action.[3] It lay also if the defendant had by his misconduct disabled himself from redelivery, as for instance if wine had been bailed, and the bailee had drunk it up.[4] But this action did not afford a remedy if the bailee misused the chattels,[5] or if he restored them in a damaged condition.[6] To get damages in these cases it was necessary to bring an action of trespass on the case. It was equally necessary to sue by this form of action if it was desired to get damages against a third person who had destroyed the goods.[7] This being so, it was but a short step to take to allow the owner to sue at once the bailee who had damaged the goods

[1] Bk. iv Pt. II. c. 2 § 1; it also superseded replevin, above 285-287.

[2] For assumpsit see below 429-453; Ames, H.L.R. xi 386.

[3] Above 327 n. 2.

[4] Y.B. 20 Hy. VI. f. 16 pl. 2; Statham, Ab. *Detinue* pl. 9; Fitzherbert, Ab. *Office del Court* pl. 22 (20 Ed. III.); Y.B. 17 Ed. III. f. 45 pl. 1; all these cases are cited by Ames, Essays A.A.L.H. iii 433 n. 7.

[5] Glanvil x 13, above 338 n. 1; Y.B. 2 Ed. IV. Pasch. pl. 9 *Littleton* says, "Jeo pose que jeo baille a vous mon toge et vous le ardez, jeo avera trespass sur le cas vers vous."

[6] Y.B. 18 Ed. IV. Hil. pl. 5 (*Brian* dissenting); cp. Y.B. 12 Ed. IV. Mich. pl. 9.

[7] Y.B. 12 Ed. IV. Mich. pl. 9.

by a form of trespass on the case;[1] and it was settled by the middle of the sixteenth century that this action on the case lay both against a bailee and against a person to whose hands the goods had come by finding or otherwise.[2]

But, even then, the sphere of this new action on the case based on a trover and a conversion differed from the sphere of the action of detinue. The gist of the action of detinue was the detention after a request to deliver or to redeliver: the gist of the action of trover was the conversion. It was only as the result of later developments that the spheres of the two actions were brought into closer approximation to one another. These developments were the work of the lawyers of the latter half of the sixteenth and of subsequent centuries; and with them I shall deal in a subsequent Book of this History.[3] But it is clear that the developments which had already taken place at the close of the mediæval period had resulted in a considerable improvement in the position of the dispossessed owner of chattels. Such an owner, whether he had parted voluntarily or involuntarily with his chattels, had a choice of remedies. If he had parted voluntarily with the chattels he might sue his bailee either in detinue sur bailment, or, if the bailee had damaged the goods, by trespass on the case. If, having parted with them involuntarily, they had got into the hands of third persons, or if, having parted with them voluntarily, a third person detained them from the bailee, he could sue such third person in detinue sur trover, or on a devenerunt ad manus; or he might be able to sue by an action of trespass on the case, alleging a trover and a conversion.[4]

Let us now turn to the effect of those developments in the law of actions upon the mediæval theory of the possession and ownership of chattels.

The Mediæval Theory of the Possession and Ownership of Chattels

The main principles and the historical development of the law relating to possession are the same in the case both of land and chattels; but the law relating to the possession of chattels has come to differ both in form and in detail from the law relating to the seisin of land. The differences arise from two connected causes. (1) Land differs from chattels both in respect

[1] Y.B. 2 Hy. VII. Hil. pl. 9; but this form of action was not allowed against a bailee who merely declined to restore till 1675, H.L.R. xi 385.

[2] Brooke, Ab. *Action sur Case* pl. 103 (26 Hy. VIII.); pl. 113 (4 Ed. VI.): Core's Case (1537) Dyer at p. 22 *per* FitzJames, C.J.

[3] Bk. iv Pt. II. c. 2 § 1.

[4] Y.B. 27 Hy. VIII. Mich. pl. 3; conversion is alleged in Y.BB. 18 Ed. IV. Hil. pl. 5, and 20 Hy. VII. Mich. pl. 13.

of its legal importance and in respect of its physical characteristics. The importance of land-holding in a society still, to some extent, organized upon feudal principles is obvious. It is obvious also that any system of land tenure necessitates the existence of two separate sets of interests in the land—the interest of the lord and the interest of the tenant; that the physical characteristics of land make it possible that it shall be enjoyed in succession; and that the large powers given to the landowner of carving estates out of his land, or of charging it in various ways, gives rise to many other simultaneous interests in the same piece of land. No such simultaneous interests were allowed to coexist in the case of a chattel. A chattel is not the subject of tenure, nor can it be carved out into estates.[1] (2) Consequently, the remedies given by law for the protection of land differ entirely from the remedies given by law for the protection of chattels. We have seen that the various interests which might coexist in land were protected each by its appropriate real action, and that the rights of the person dispossessed of a chattel were protected only by personal actions. Though, as we shall now see, the evolution of these personal actions has produced a law as to possession fundamentally similar to the law as to seisin,[2] the form in which these bodies of law have come to be expressed is so different that this fundamental similarity may easily be overlooked.

That the common law has, throughout its history, applied to the possession of chattels the same general principles as it applied to the seisin of freehold interests in land, will be clear if we look at the following facts and rules of law: (1) the words "seisin" and "possession" were used convertibly till quite the end of this period;[3] and the lawyers frequently illustrate the principles of the law as to possession from the law as to seisin.[4] (2) We have seen that the rule that two persons cannot possess the same thing at the same time was as applicable to chattels as it was to land.[5] (3) The person in possession is the person who has all the rights of an owner, "the convertor of a chattel, like the disseisor of land had the power of present enjoyment and the power of alienation. If dispossessed by a stranger he might proceed against him by trespass, replevin, detinue, or trover. He could sell the chattel or bail it. It would go by will to the executor, or be cast by descent upon the administrator. It was forfeited to the crown

[1] See H.L.R. iii 39; for the history of the very limited extent to which future interests in chattels could be created at common law see Bk. iv Pt. II. c. 2 § 2.

[2] Above 89-95. [3] Vol. ii 581.

[4] See e.g. Y.BB. 2 Ed. IV. Mich. pl. 8; 6 Hy. VII. Mich. pl. 4 (p. 9) *per* Brian, and (p. 8) *per* Vavisor.

[5] Above 96.

for felony; and was subject to execution."[1] Thus a delivery of chattels by a trespasser had a tortious effect very similar to the effect of a feoffment by a disseisor.[2] (4) On the other hand, the person out of possession had merely a right to recover the chattel; and that right was a chose in action which was inalienable.[3] He might retake it; but, as we have seen, his rights of recaption were very limited.[4] It is true that quite at the end of this period some of the judges were of opinion that he might release his rights to the trespasser; but this was denied by others;[5] and even this very limited exception was not established till the following period. If he owed money (unless the creditor was the king) no execution could be levied from chattels which were out of his possession.[6] If a villein or a wife were dispossessed of their chattels neither the lord nor the husband could assign their rights to the villein's or the wife's chattels, unless and until they had reduced them to possession in the lifetime of the villein or wife.[7] We shall see that, though it was settled in Edward I.'s reign that the executor or administrator of a deceased person could bring debt or detinue for the property of the deceased,[8] it was only by virtue of express legislation that he got the right to bring trespass for chattels carried off in the deceased's lifetime.[9] The chief instance in which the position of a dispossessed owner of a chattel differed from that of a disseised owner of land was in respect of the rights of the crown to the chattels of a dispossessed owner, who had died intestate and without next of kin, or who had been convicted of felony or outlawed. We have seen that in the case of land there was no escheat in such cases;[10] but in the case of chattels the crown took them, in the first case as *bona vaccantia*, and in the other two cases as forfeited. They were choses in action, it is true; but the rule that choses in action are not assignable does not apply to the crown.[11] (5) A delivery of possession

[1] Ames, Essays A.A.L.H. iii 560; and cp. Y.B. 17, 18 Ed. III. (R.S.) 628, the reply of W. Thorpe to a plea of justification in an action of trespass for carrying off lead.

[2] Ames, Essays A.A.L.H. iii 550, 551; Pollock and Wright, Possession 169, 170; as is pointed out by Fineux and Tremayle, C.JJ., this rule does not apply where a stranger takes goods from a bailee or from a person wrongfully in possession, Y.B. 21 Hy. VII. Mich. pl. 49 cited below 358 n. 6, as in that case the owner could sue the stranger by action of detinue or trover, above 326-327, 350-351.

[3] Y.B. 6 Hy. VII. Mich. pl. 4, "Le lessee poit surrenderer per parol, mes si le lessor luy disseisit, et or il voile surrenderer son droit per parole c'est void, et issint jeo entend touts fois qu'on ne poit surrenderer son droit, ou doner ou releaser per parol soit cel chose personel ou real, car tout est un a tiel entent comme semble."

[4] Above 279-280.

[5] Y.BB. 2 Ed. IV. Mich. pl. 8 *per* Danby, C.J., and Nedham, J., dissentiente Littleton *arg.*; 6 Hy. VII. Mich. pl. 4 (pp. 8, 9) *per* Vavisor, J., dissentiente Brian C.J.; cp. Ames, Essays A.A.L.H. iii 555.

[6] Y.B. 22 Ed. IV. Pasch. pl. 29. [7] Ames, Essays A.A.L.H. iii 558-559.

[8] Below 584. [9] Ibid. [10] Above 92.

[11] Ames, Essays A.A.L.H. iii 558; for the history of choses in action see Bk. iv Pt. II. c. 2 § 3.

was in the thirteenth century in all cases as necessary for the valid transfer of a chattel as a livery of seisin was for the valid transfer of a freehold interest in land.[1] But of this last rule, and of two important exceptions to it which emerged during this period, it is necessary to speak a little more in detail.

The rule that a delivery of possession is necessary for the valid transfer of a chattel is the law of England to-day. It was laid down in 1890 in the case of *Cochrane v. Moore*[2] that "according to the old law no gift or grant of a chattel was effectual to pass it, whether by parol or deed, and whether with or without consideration, unless accompanied by delivery." Thus was settled in strict accordance with historical truth a longstanding doubt whether or not the property in chattels could pass by parol gift without delivery. But it was not till the following period that this doubt emerged, and therefore I shall deal with the history of this episode in the following Book of this History.[3] It is true that it was recognized in Edward IV.'s reign, if not earlier, that no delivery was needed if the goods were already in the possession of the transferree.[4] To use Roman terms, a traditio brevi manu was an effectual traditio. But this is no real exception. The case of *Cochrane v. Moore* did, however, recognize that there were two real exceptions to the general rule: "On that law two exceptions have been grafted, one in the case of deeds, and the other in that of contracts of sale where the intention of the parties is that the property shall pass before delivery."[5] Of the history of these two exceptions I must speak at this point because they emerged during this period.

According to the law of the thirteenth century no property passed upon a bargain and sale until delivery had been made or

[1] Glanvil x 14; P. and M. ii. 179, 208, citing Bracton f. 62 and Fleta p. 127; references cited in Cochrane v. Moore (1890) 25 Q.B.D. at pp. 66-67; vol. ii 277; H.L.R. vi 393 and n. 5; Madox, Form. Angl. no. 167—a deed, dated 15 Ed. II., which after reciting a sale of "blada prata et pasturæ," and the gift of earnest, goes on to provide that the vendee shall not remove the goods till the whole price is paid. This looks as if the vendee would have been entitled to carry off the goods on such *a bargain and sale;* but it implies that, till carried off, they remained the property of the vendor; a fortiori no property could pass on a mere *agreement to sell* specific goods.

[2] 25 Q.B.D. at pp. 72-73.

[3] Bk. iv Pt. II. c. 2 § 2.

[4] "En detinue des chateaux il est bon plee a dire que le pleintif puis le bailment ad done eux al defendant, et uncore il poit avoir son ley, *quod fuit concessum,*" Y.B. 21 Ed. IV. Mich. pl. 27 *per* Brian, C.J.; cp. Cochrane v. Moore (1890) 25 Q.B.D. at pp. 69, 70; Stoneham v. Stoneham [1919] 1 Ch. at pp. 154-155 *per* P.O. Laurence, J.

[5] 25 Q.B.D. at p. 73; Lord Esher, M.R., ibid at pp. 74, 75, laid it down that this exception applied to a contract both of sale and exchange; and generally the same principles apply to both contracts, though, as Chalmers points out, "the question has been by no means fully worked out," Sale of Goods Act (2nd ed.) 4; however, the history of the origin of this exception, below 355-357, would seem to indicate that Lord Esher was right in thinking that a contract either of exchange or of sale would pass the property.

taken.[1] The vendor could, on delivery, sue for the price by action of debt. The purchaser on payment could not sue for the goods by action of detinue. His remedy was to sue by writ of debt in the detinet. He could not sue by writ of detinue because he could not allege that the things were his.[2] Probably if the contract were merely executory neither could sue the other.[3] The same rule was applied as was applied in later law to contracts other than the contract of sale.[4] In Henry VI.'s reign, however, it was said that upon an agreement to sell a specific chattel the vendor could sue in debt and the purchaser in detinue.[5] The right to get the chattel gave a right to sue in detinue; and this applied both to the case of the purchaser in an agreement to sell, and to a third person to whom goods were to be handed by a bailee of the owner.[6] It is clear that this is a departure from the old law and an extension of the actions of debt and detinue. It seems to me that in these extensions we can see the origin of the doctrine that a contract of sale of specific goods passes the property in the goods.

We have seen that the action of detinue had come to be generally used by owners out of possession to assert their right to possession.[7] No doubt its proper sphere was the recovery of a possession which had formerly belonged to the plaintiff. But if it could be generally used to assert a right to possession, why limit it to the case where the person having such right had formerly been in possession? It was, however, inevitable that this extension of the scope of the action of detinue should react on the action of debt. At this period the theory had been developed that the receipt of any substantial benefit—*quid pro quo*—would support an action of debt against the recipient by the person who conferred that benefit. As a general rule it is only performance by the plaintiff which will amount to a sufficient *quid*

[1] Above 354 n. 1.

[2] Y.B. 50 Ed. III. Trin. pl. 8, debt for four quarters of corn due as rent—"bref de detinue ne puis jeo aver en le cas, pur ceo que jeo n'ava unques propertie en mesmes les biens devant, et puis le bref fuit agard bon;" cp. Y.BB. 3, 4 Ed. II. (S.S.) 26; 7 Hy. IV. Pasch. pl. 10.

[3] Y.B. 21 Ed. III. Hil. pl. 2.

[4] Y.BB. 37 Hy. VI. Mich. pl. 18 (p. 9) *per* Moile; 12 Ed. IV. Pasch. pl. 22 (*per* Brian).

[5] Y.B. 20 Hy. VI. Trin. pl. 4, *Fortescue* (*arguendo*) says, "Sir, jeo veux prouver que si jeo achete un cheval de vous, maintenant le propertie del cheval est a moy, et pur ceo vous aurez breve de Debte pour les deniers, et j'aurai Detinue pour le cheval sur cest bargain;" cp. Y.BB. 37 Hy. VI. Mich. pl. 18; 17 Ed. IV. Pasch. pl. 2; 49 Hy. VI. Mich. pl. 23.

[6] "Mes quant a ce que *Laicon* ad dit que si jeo baille certeins biens ou chattels a bailler a un J. que le property est or en J. et nemy en moy, et que J. aura action de ce, et nemy moy; ce n'est pas issint: car il est chargeable a nous ambideux; car s'il ne livre les biens a J. jeo puisse avoir action et J. puit avoir action, mes l'un action sera fin de tout," Y.B. 39 Hy. VI. Hil. pl. 7, *per* Prisot, C.J.

[7] Above 351.

pro quo; but it is clear that a right to sue in detinue is almost as substantial a benefit as performance; and therefore a contract to sell which conferred such a right would be a *quid pro quo* for the right to sue in debt.[1] It is equally clear that this reasoning will not apply to contracts in general, but only to a contract of sale. If I agreed with a carpenter to build me a house for £20, no right of action accrued to me during this period by the mere fact of the agreement.[2] There was therefore no *quid pro quo* for my promise to pay till the house was built. Inasmuch as there was no right of action recognized by the common law for unliquidated damages for breach of an executory agreement, the making of such a contract could be no *quid pro quo* for an action of debt. As there was a right of action for failure to deliver a specific chattel, based on the right to possession thereby given, the making of such a contract was a sufficient *quid pro quo* for an action of debt.

This being the case, it is not difficult to see how the idea arose that the property passes upon an agreement to sell a specific chattel. If A agrees to sell B his horse for £10, A can bring debt for the money, because he has a right to it by virtue of B's grant. B can bring detinue for the horse because he has a right to the possession by virtue of A's grant. As we have seen, this right to possession is very often called "property" in the Year Books.[3] When improved remedies made this right to possession more easily enforceable it took upon itself more of the characteristics of ownership. It was natural to think of the rights of any one who had a right to possess enforceable by the action of detinue as property. If, therefore, a contract of sale were made which gave the purchaser the right to bring detinue for the thing sold, it was easy to say that he had the property as the result of the sale.[4] It is clear that this reasoning will not apply to sales of

[1] H.L.R. xi 259, "The right of the buyer to maintain detinue and the corresponding right of the seller to sue in debt were not conceived of by the mediæval lawyers as resulting from mutual promises, but as resulting from reciprocal grants—each party's grant of a right being the *quid pro quo* for the corresponding duty of the other;" Y.B. 49 Hy. VI. Mich. pl. 23 *per* Choke; and cp. Plowden, Comm. at p. 11, where it is said that, "An action of debt for the duty . . . is taken to be of the same effect as a satisfaction indeed and shall countervail a satisfaction;" see below 421-423 for *quid pro quo*.

[2] Y.B. 37 Hy. VI. Mich. pl. 18 *Prisot*, C.J., says, "On poet avoir action de Debte sur retention ove un home estre de son conseil, et que j'aurai xls. per an; uncore j'aurai bon accion sur cest contract; mes en cest cas covient a moy declarer en mon count que jeo suis ove luy, ou autrement voile luy consailler, s'il le voile avoir demande." We may note, too, that to succeed in debt the price must have been fixed, Y.B. 12 Ed. IV. Pasch. pl. 22 (p. 9) *per* Brian, C.J.; below 423.

[3] Above 331.

[4] Cp. Blackstone's words (Comm. ii 448), "As soon as the bargain is struck the property of the goods is transferred to the vendee, and that of the price to the vendor;" as Sir F. Pollock says, L.Q.R. ix 283, 284, this is only intelligible if we interpret property to mean the right to get possession which can be enforced by the appropriate action; it should be noted however that no property would pass by the

chattels which are not specific, as detinue would not lie in such a case.[1] Therefore although an "executed contract of sale" will pass the property in the goods, an "executory contract of sale" will not. It is clear too that this reasoning does not apply to the case of a sale of land. Till livery of seisin has been made no real right to the land passes.[2] The intenser ownership of land protected by the real actions made the line between the personal right against a vendor to get seisin of the land, and the actual obtaining of seisin, far more clear than it could be in the case of a chattel. In the case of a chattel a contract of sale gave a right to possession which was asserted by the same form of action as the right of an owner out of possession to get possession was asserted. In the case of land the personal action which lay against a vendor, and the real actions which lay against a disseisor, were wholly different.

It is probable that the second exception—the gift by deed—was introduced in the course of the fifteenth century. In 1468 the reporter notes, as if it were new law, the fact that Choke and the other judges had held that such a gift could be made by deed without delivery, and that it could only be avoided if the donee disclaimed it in a court of record.[3] It is possible that causes similar to those which gave rise to the first exception gave rise also to this. It is well known that if A promises B by deed a sum of money B can sue by the action of debt.[4] There seems to be no reason why B should not sue A by action of detinue if A promised him by deed a specific chattel.[5] If this is the case, the

agreement if payment and delivery were to be simultaneous, Y.B. 17 Ed. IV. Pasch. pl. 2 (p. 2) *per* Littleton, and even if the property passed, no delivery need be made till payment, ibid, *per* Brian, C.J.

[1] "A man bought twenty quarters of barley to be delivered at a certain place on a certain day; the vendor did not perform his contract, by which the vendee was driven to buy barley for his business, being a brewer, at a much greater price; the vendee upon this matter was permitted to bring an action upon the case, and adjudged maintainable: and so he might well have had an action of debt for barley, but not detinue, for the property of the barley could not be known, for one quarter cannot be known from another quarter," Core's Case (1537) Dyer at f. 22b.

[2] In Y.BB. 20 Hy. VI. Trin. pl. 4; 22 Hy. VI. Hil. pl. 29; 37 Hy. VI. Mich. pl. 18, *Prisot* and *Newton*, C.JJ., held that though no right to the possession of the land passed, yet debt lay for the price; as Ames says, Lectures on Legal History 140 n. 3, this was "an idiosyncrasy of these three judges. . . . There was no *quid pro quo* to create a debt;" and so the law is laid down, Y.B. 12 Hy. IV. Hil. pl. 13; as we shall see (below 438) the view taken by these judges can be explained by the history of the development of the action of assumpsit.

[3] Y.B. 7 Ed. IV. Mich. pl. 21; cp. L.Q.R. VI. 448.

[4] Bl. Comm. ii 442, "Where A contracts with B to pay him £100 and thereby transfers property in such sum to B, etc.;" cp. L.Q.R. ix 283.

[5] In Y.B. 22 Hy. VI. Hil. pl. 33 (p. 46), it is said that if A bails goods by deed to B, to be rebailed to him, A, detinue lies; in Y.B. 39 Hy. VI. Mich. pl. 46, *Prisot*, C.J. says, "Si jeo baille biens per fait indente et puis porte bref de detinue pour ceux jeo ne count sur le fait indente pur ce que n'est que chose testmoinant le baillement . . . *ad quod omnes justitiarii concesserunt;*" I have found no distinct

same reasoning which applies to the case of sale will apply to a deed promising to give. *Dockeray's Case* (1536) would seem to show that this reasoning was so applied. It was said in argument in that case, and not contradicted, that a "covenant relating to a personal thing can alter the possession of that thing. As if I covenant with you that if you pay me £20 you shall have all my cattle within the manor of Dale, if you pay the £20 on such a day, then you can take all my cattle within the said manor, and on payment there is a perfect contract. . . . And the law is the same if I bargain with you for money." [1] But, as a matter of fact, as this case recognizes, a deed has a double aspect. It may operate either as a contract or a conveyance; and this double aspect has always been one of its characteristics.[2] In the Middle Ages it is something between a conveyance and a contract. It is the grant of a liability to pay or do conclusively evidenced by the sealed writing—just as the receipt of money or chattels from another was evidence of a grant by the recipient that he was liable to pay a certain sum which could be recovered by action of debt.[3] At the end of the period both the contractual and the conveying powers of the deed became more clearly distinct. The deed became the only mode of making an executory contract.[4] On the other hand, it was being recognized that a deed could both convey a chattel and create or transfer an incorporeal hereditament.[5] No doubt the rule that a promise under seal to convey goods passed the property was helped by this double aspect, which from the first had been characteristic of the writing under seal.

The recognition of these two exceptional cases, in which property could be conveyed without delivery, no doubt helped to develop the idea that ownership is a right which can be distinguished from the fact of physical control.[6] But there is no

authority for the proposition in the text, but it seems logically to follow from the law laid down in the case of sale, and from the law laid down in the case of a bailment to rebail to a third person, Y.B. 39 Hy. VI. Hil. pl. 7 *per* Prisot, above 355 n. 6.

[1] Y.B. 27 Hy. VIII. Trin. pl. 6 (p. 16) *per* Deinshil, *arg.*; Brooke, Ab. *Propertie* pl. 2.

[2] P. and M. ii 215, 216.

[3] Y.B. 39 Hy. VI. Mich. pl. 46.

[4] Below 420.

[5] Vol. ii 580; above 98-99.

[6] Perhaps this is illustrated by a dictum of Fineux and Tremayle, C.JJ., who said, Y.B. 21 Hy. VII. Mich. pl. 49, "Si jeo baille les biens a un home, et il eux don a un estranger ou vend: si l'estranger eux prend sans livere, il est trespassor, et jeo aurai bref de trespass vers luy: car per le don ou vend le properte ne fuit change mes (per) le prisel: mes s'il fait delivere d'eux al vendee ou donee, donque jeo n'aurai bref de trespass;" these two judges could hardly have been ignorant of the fact that a sale passes the property, nor could they have intended to hold that if I (the owner) by word give goods to X, I can sue X if he takes in pursuance of my gift, provided that the gift stands unrevoked; clearly they intended to hold that a mere sale by a non-owner cannot pass the property, though a delivery by a non-owner passes the possession. Thus the dictum shows that, in one case at least, this rule did emphasize the distinction between ownership and possession.

doubt that the strongest influence making for this recognition must be looked for, not in these two exceptional rules, but in those modifications of the personal actions which gave increased powers to dispossessed owners.[1] And here again we can see a similarity between the law as to chattels and the land law; for just as the right of a disseised owner to get seisin was developed by modifications in the real actions,[2] so the position of the dispossessed owner was improved by gradual modifications in some of the personal actions. Thus, as I said at the outset, the historical development of the law relating to the possession of chattels is parallel to the historical development of the law relating to the seisin of land. Possession is prima facie evidence of ownership. The possessor has, as against third persons, all the rights of an owner; but the right of the true owner to possession is better protected. The man with the better right to possession has "the property." This better right to possession is the only form of "property" either of lands or chattels recognized by the common law.

Everywhere we can trace the leading doctrines and the fundamental distinctions of the common law to differences between the classes of actions and to epochs in the history of some one class of actions. The differences between the classes of actions mark out the main divisions of the law. The epochs in the history of each class leave their traces in substantive rules which may be justified but hardly explained upon strictly analytical principles. They can usually be justified because, owing to the manner in which the forms of action were moulded under the pressure of the constantly shifting demands of human society, there either is or has been some obvious need behind them which they have been formed to satisfy. They cannot be explained unless we watch the mode in which these ever-shifting social, business, and political demands of successive generations instruct the lawyers to make and improve, and again to improve and remake, the technical machinery which will satisfy them. The history of this process shows us how the lawyers of past ages have made laws fit to rule a changing society, and how those laws have sometimes reacted upon the society, the needs of which have been the primary cause of the shape which the lawyers have given to them. In the following period we shall see that the same processes centering round the actions of trover and ejectment, instead of round these mediæval personal and real actions, have built up our modern law of ownership and possession.

[1] Above 327, 348-351.

[2] Above 92-93.

I have dealt with the history of the possession and ownership of chattels in the common law in a chapter upon crime and tort, because, as we have seen, it is through the working of delictual and quasi-criminal remedies that the common law attained a theory about these matters. We must now turn again to the law of crime and tort, and, with the help of the light which we have derived from the common law theory of possession, examine those wrongs to property which the law recognized at this period.

§ 7. Wrongs to Property

In this section I shall deal, firstly, with the four felonies of larceny, robbery, burglary, and arson, and, secondly, I shall say a few words about the other wrongs to property which were remedied for the most part by the action of trespass and its offshoots.

Larceny.

Larceny, though the most important and the most common of the wrongs to property, was the last to be included in the list of felonies.[1] We have seen that the older proceedings for larceny partook quite as much of the nature of a proceeding to recover the goods as of a proceeding to punish a criminal.[2] The proceedings by which a wrong is punished have much to do with determining its legal nature; and it may well have been thought unjust to class the person convicted upon an accusation of larceny (who might well be an honest man) with the person convicted of such heinous offences as murder, rape, robbery, or arson.[3] However that may be, the offence of larceny was included by Henry II. among the pleas of the crown to be prosecuted by indictment;[4] and from that time it has taken its place among the felonies.

Bracton defined larceny in terms drawn from Roman law, but so modified as to suit English law. It is "the fraudulent dealing with another man's property with the intent of stealing it against the will of its owner."[5] The judges of the fourteenth

[1] P. and M. ii 493. [2] Above 320.

[3] Maitland (P. and M. ii 493) says that Bracton treats theft differently from the other felonies—"he seems hardly to know that appeal of larceny which became fashionable at a later period, nor do we find appeals of larceny as distinguished from robbery on the earliest plea rolls."

[4] Assize of Clarendon (1166).

[5] f. 150b, "Furtum est secundum leges contrectatio rei alienæ fraudulenta cum animo furandi, invito illo domino cujus res illa fuerit;" cp. Just. Dig. 47. 2. 1. 3, "Furtum est contrectatio rei fraudulosa lucri faciendi gratia vel ipsius rei vel etiam usus ejus possessionisve."

and fifteenth centuries, starting with this definition, interpreted it in such a way that it fitted in both with the theory of possession which I have just described,[1] and with the English division into land and other property which could be recovered in a real action, and property which was not land and could not be recovered in a real action.[2] To a certain extent also they were influenced by older rules which drew distinctions based upon the idea that the thing stolen must be property of some value, and upon the idea that the gravity of the crime depended on the value of the property stolen. In describing larceny, therefore, we must consider (1) the elements due to the common law theory of possession; (2) the question of the value of the thing stolen; and (3) the things which cannot be the subject of larceny.

(1) *Larceny and the theory of possession.*

Fraudulent dealing—"contrectatio"—is a vague term and covered many things in Roman law.[3] In English law it is narrowed down to the case where there has been an actual physical change of possession effected by the act of the thief without the consent of the person entitled to the goods.[4] This change of possession has from the earliest times been essential to larceny;[5] so that there can be no larceny where there is no trespass. A wife cannot steal her husband's goods, for a taking by her works no change in the possession; they remain in the husband's possession as before.[6] In addition there must be an asportation—a carrying away; but from the time of the Year Books a very slight removal sufficed. Thus when a man stayed in another's house, got up early, took the sheets from the bedroom to the hall intending to steal them, went to the stable to get his horse, and was caught by the ostler, he was held to be guilty of larceny.[7]

Bracton, as we have seen, laid stress on the *animus furandi;*[8] but we have seen that appeals of larceny were often brought against innocent people.[9] However, when larceny became a felony to be prosecuted by indictment, and when the mental element in felony came to be regarded as its distinguishing characteristic, felonious taking was distinguished from other unlawful taking by reference to the intention of the taker.[10]

[1] Above 351-354. [2] Vol. ii 261-262.
[3] Moyle, Justinian notes to Instit. 4. 1. 1.
[4] Hale, P.C. i 504 seqq.; Kenny, Criminal Law 182, 183; as to larceny by a finder see the Eyre of Kent (S.S.) i 81, 146.
[5] Britton i 115. [6] Fitz., Ab. *Corone* pl. 455; below 526-527.
[7] 27 Ass. pl. 39. [8] Vol. ii 359.
[9] Above 320; cp. Y.B. 21, 22 Ed. I. (R.S.) 106.
[10] Y.B. 13 Ed. IV. Pasch. pl. 5 *per* Hussey, the King's Attorney, "Felony is to claim feloniously the property without cause, to the intent to defraud him in

Definite rules as to various circumstances under which this intent may be held to exist have been and still are being worked out as concrete cases arise for decision. It was settled during this period that the intent must be to deprive the person out of whose possession the things are taken of the benefit of that possession. We have seen that possession and property are not accurately distinguished in earlier law. The possessor is *prima facie* the owner, and is treated as such till another can prove a better right to possession.[1] Hence, a bailee, from whose possession goods had been taken feloniously, could prosecute any one, even the bailor,[2] unless probably the bailment was determinable at the bailor's will.[3] Seeing that the essence of the offence is the taking, English law does not require that the thief should have intended to profit by the things stolen. Bracton omits this element from the Roman definition; and it has probably never been part of English law.[4]

It follows from these principles that the scope of larceny in English Law was far too narrow to be an adequate protection to owners of chattels. (i) Seeing that a trespassory taking was required, the offence could not be committed by any one who came to the possession of the goods with the consent of the owner,[5] or with the consent of the bailee if they were bailed.[6] It is only by statute that appropriation by a bailee is larceny.[7] (ii) For the same reason, if the owner really consented to part with his entire property in the thing, no offence was committed, even though that consent had been obtained by fraud.[8] It was only if the fraud was carried out by means injurious to the public generally that the misdemeanour of cheating was committed.[9] Hence the necessity for creating the offence of obtaining goods

whom the property is, animo furandi." *The Chancellor*, "Felony is according to the intent." *Molineux*, "A matter lawfully done may be called felony or trespass according to the intent." The translation is from Pollock and Wright, Possession 134, 135.

[1] Above 352-353.

[2] Y.B. 7 Hy. VI. Trin. pl. 18, "Et fuit dit que si jeo vous baille certeins biens a gard et puis jeo eux reprend felonisement, jeo serai pendu, et uncore le propertie en moy. Et *Norton* dixit que il fuit ley;" cp. Y.B. 13 Ed. IV. Pasch. pl. 5 *per* Nedham, J.

[3] Pollock and Wright, Possession 165.

[4] Stephen, H.C.L. iii 132.

[5] Y.B. 13 Ed. IV. Pasch. pl. 5; cp. Pollock and Wright, Possession 131, 132.

[6] Y.BB. 16 Hy. VII. Mich. pl. 7; 21 Hy. VII. Mich. pl. 49. If a third person *takes* goods from a bailee the bailor can sue in trespass, and, of course, larceny has been committed, see Pollock and Wright, op. cit. 169, 170.

[7] 21 Henry VIII. c. 7 (if the bailee was a servant); 20, 21 Victoria c. 54 § 17 (bailees generally).

[8] Pollock and Wright, op. cit. 218-220; the distinction between this case and the cases where there has really been no consent to pass the entire property (larceny by a trick) is later than this period.

[9] Stephen, H.C.L. iii 161.

by false pretences.[1] (iii) The person in possession had, as we have seen, the rights of an owner; hence if a thief passed the goods to a third person, that third person, having got the goods by a delivery, even though he knew that they had been stolen, had not committed larceny,[2] but only a misdemeanour.[3] For this reason it was necessary to create the felony of receiving stolen goods knowing them to have been stolen.[4] Even in this period the inadequacy of larceny, as thus deduced from the principles of the law of possession, must have been apparent. But the lawyers of this period were above all logical; and it was only in two respects that they mitigated the severity of their logic in order to give a more ample protection to property.

(*a*) It was during this period that the modern distinction between the bailee who has possession and who therefore cannot commit larceny, and the servant who has no possession and who therefore can commit larceny, was growing up. The growth of the distinction was gradual. During the thirteenth and earlier part of the fourteenth century all kinds of dependants brought the appeals of larceny or robbery if chattels were taken from their custody. In 1194 an appeal was brought by the "serviens" of a lord;[5] Bracton states in one passage that it does not matter whether the stolen thing was the property of the appellor or not, provided that it was taken from his custody;[6] and in 1344-1345 Huse said,[7] *arguendo*, "A writ of trespass and a writ of appeal are given to him to whom property belongs, and also to one out of whose possession the goods are taken, because both servant and master will have an appeal in respect of the same felony."

It is clear that the modern distinction was unknown to Bracton; and it is hardly possible that it should have occurred to him. His Roman authorities attributed possession neither to bailees nor to servants; and, as we have seen, he could find in the rules as to who could bring the actio furti, which he identified with the appeal of larceny, a sufficient explanation of their

[1] 30 George II. c. 24 § 1; 7, 8 George IV. c. 29 § 53.

[2] Y.BB. 21 Ed. IV. Hil. pl. 6; 16 Hy. VII. Mich. pl. 7. It would seem, too, that if A stole X's goods, and B then stole them from A, X, though he might *appeal* B of theft, could not sue him for trespass, Y.B. 21 Ed. IV. Hil. pl. 6; Pollock and Wright 155-157; above 323; though it was otherwise if B stole from X's bailee, above 348, 358 n 6.

[3] Hale, P.C. i 620.

[4] 5 Anne c. 31; 7, 8 George IV. c. 29 § 54; cp. Stephen, H.C.L. ii 238.

[5] Rot. Cur. Reg. 53, cited H.L.R. xxix 509 n. 68; it should be noted that the term there used is "serviens" which may denote a servant or a tenant by serjeanty —perhaps at this date this would have been a distinction without a difference, above 46.

[6] "Et non refert utrum res, quæ ita subtracta fuit, extiterit illius appellantis propria vel alterius, dum tamen de custodia sua," f. 151a.

[7] Y.B. 18, 19 Ed. III. (R.S.) 508.

right to bring their appeals against a thief. Their right to sue depended, he considered, in English as in Roman law, upon the fact that they were accountable to the owner.[1] We have seen that he emphasized this fact, and made their right to sue depend upon it.[2] It is not, I think, improbable that it is in this condition of accountability, upon which the right to sue is founded, that we can find the germ of the distinction between the servant and the bailee. At any rate it indicates the line upon which the separation gradually proceeded; for it roughly differentiates the mere servant from those whose powers and discretion are greater.[3] The principle that the bailee had possession was too firmly rooted in the common law to be got rid of. But it was obviously inconvenient to attribute possession to mere servants who would be very unlikely to be able to indemnify the owner if they abused the large powers which possession conferred. Besides they might well be villeins;[4] and technical difficulties stood in the way of allowing them to sue as if they were owners.[5] And so, as Stephen says, "the distinction between a charge and a possession readily suggested itself."[6] But it took some time to harden into a technical rule. It was hinted at in 1339;[7] but, as we have seen, it seems to be ignored in 1344-1345.[8] It was stated clearly enough in 1474, and extended to the case of a person allowed to use a thing by the mere licence of the owner, such as the guest at a tavern;[9] but in 1488 Brian and the other judges seem to deny it.[10] It was, however, finally established, in 1506;[11] and the law as thus established was summed up and passed on into modern law by Coke.[12] In modern law the

[1] Above 340-341. [2] Above 340 n. 7.
[3] See below 365 n. 6.
[4] As to the incapacity of villeins see below 491-500.
[5] Above 337 n. 3. [6] H.C.L. iii 151.
[7] 12 Ass. pl. 32. [8] Above 363.
[9] Y.BB. 49 Hy. VI. Mich. pl. 9; 13 Ed. IV. Pasch. pl. 5, "If a taverner serve a man with a piece, and he take it away, it is felony, for he had not possession of this piece; for it was put on the table but to serve him to drink: and so it is of my butler or cook in my house; they are but ministers to serve me, and if they carry it away it is felony, for they had not possession, but the possession was all the while in me; but otherwise peradventure if it were bailed to the servants, so that they are in possession of it."
[10] Y.B. 3 Hy. VII. Mich. pl. 9.
[11] Y.B. 21 Hy. VII. Hil. pl. 21; translated by Kenny, Select Cases on Criminal Law 216.
[12] "Also there is a diversity between a possession and a charge, for when I deliver goods to a man he hath the possession of the goods, and may have an action of trespass or an appeal, if they be taken or stolen out of his possession. But my butler or cook that in my house hath charge of my vessel or plate hath no possession of them, nor shall have an action of trespass or appeal, as the bailee shall; and therefore if they steal the plate or vessel, it is larceny. And so it is of a shepherd. . . . If a taverner set a piece of plate before a man to drink in, and he carry it away, etc., this is larceny: for it is no bailment but a special use to a special purpose," Third Instit. 108.

principle is applied to all licencees. None of them have possession;[1] and therefore all of them can commit larceny of the goods which they are allowed to use.

None of these exceptional cases covered very much ground. The most important is the case of the servant; and, at first, this exception was, as we might expect from the manner in which it originated, very narrowly construed. It was said in the Year Book of 1506 that it only applied if the servant was on his master's premises, or while he was accompanying him.[2] This was recognized to be law by the framers of the statute of 1529, which was passed to extend this exception. That statute enacted that if a person delivered goods above the value of 40s. to his servant to keep or to carry for him, and the servant took them animo furandi, he should be guilty of felony.[3] Hence we get the modern rule that a servant can commit larceny of his master's goods entrusted to his custody, not only if he is on his master's premises or accompanying him, but also if the goods have been delivered to him by his master to keep, or even to use, or to carry to a third person, in the course of his employment as servant.[4]

Even as thus extended the exception did not apply if the master transferred the property to the servant for a special purpose,[5] or presumably if he specifically bailed the possession to him;[6] and what was perhaps more important, it did not apply if goods were given by a third person to a servant to give to his master.[7] This latter defect was not remedied till the statutory offence of embezzlement was created.[8]

[1] Reeves v. Capper (1838) 6 Bing. N.C. 136.

[2] "Tantost que il est in ma meason, ou ove moy, ce que j'ay deliver a luy est ajuge in ma possession; comme mon butler que ad mon plate en gard, si il fuye ove ce, il est felony: meme le Ley si cesty que gard mon cheval va: et la case est, ils sont touts fois in ma possession: mes si jeo deliver un cheval a mon servant de chevaucher a la marche, et il fuye ove luy, il n'est felony, car il vient loialment a le cheval par delivery. Et issint est, si jeo done a luy une bague de carier a Londres; ou de payer a ascun, ou de emer ascun chose, et il fuye ove ce, il n'est felony; car il est hors de ma possession, et il vient loialment a ce," Y.B. 21 Hy. VII. Hil. pl. 21; cp. Y.B. 49 Hy. VI. Mich. pl. 10 *per* Billing.

[3] 21 Henry VII. c. 7; Coke, Third Instit. 105; Hale, P.C. i 505.

[4] Pollock and Wright, Possession 138.

[5] Ibid, and authorities cited in n. 6.

[6] See Y.B. 13 Ed. IV. Pasch. pl. 5 cited above 364 n. 9; Pollock and Wright, Possession 138-139; it would seem that even in modern law the extent of the authority given to the servant may make his "charge" very like a true possession—"It may be that it will sometimes as against strangers be treated as a possession in cases when the servant's charge is to be executed at a distance from the master and when the manner of the execution is necessarily left to the discretion of the servant," ibid 139-140; so that there was good sense in the line drawn in the Y.BB., but the exigency of the statute 21 Henry VIII. c. 7 has caused the line to be drawn at a somewhat different place.

[7] Dyer 5a; Coke, Third Instit. 105; Stephen, H.C.L. iii 152, 153.

[8] 39 George III. c. 85.

(*b*) The second exception to strict principle is to be found in the famous case of the carrier who broke bulk.[1] It was decided in that case that "a bailee of a package or bulk might, by taking things out of the package or breaking the bulk, so far alter the thing in point of law that it becomes no longer the same thing—the same package or bulk—which he received, and thereupon his possession was held to become trespassory. If a carrier fraudulently sold the whole tun of wine unbroken he committed no crime; if he drew a pint it was felony; per Choke, J."[2] That this was a departure from principle is obvious. As Brian put it, "Where he has the possession from the party by a bailing and delivery lawfully it cannot after be called felony nor trespass, for no felony can be but with violence and vi et armis, and what he himself has he cannot take vi et armis nor against the peace; therefore it cannot be felony nor trespass, for he may not have any other action of these goods but action of detinue." The goods in question belonged to a merchant stranger; and the judges, perhaps to please the king, who might otherwise have been involved in diplomatic difficulties,[3] "reported to the chancellor in council that the opinion of most of them was that it was felony." The face of the strict doctrine was saved by adopting the distinction suggested by Choke between breaking bulk and taking the whole of the goods without breaking bulk.

(2) *The value of the thing stolen.*

Many systems of law distinguish between the larceny of large things and the larceny of small, and between manifest and non-manifest theft.[4] "In England both an old English and an old Frankish tradition may have conspired to draw the line between 'grand' and 'petty larceny' at twelve pence."[5] Grand larceny, as we have seen, became a felony, and therefore punishable with death. Petty larceny, not being a true felony,[6] was only punishable by whipping or the pillory. The fact that

[1] Y.B. 13 Ed. IV. Pasch. pl. 5; a translation of this case will be found in Pollock and Wright, Possession 134-137.

[2] Ibid 133. [3] Stephen, H.C.L. iii 139, 140.

[4] As Maitland has shown (P. and M. ii 494 n. 1) the distinction between the thief caught in the act and the thief afterwards discovered was known to English law before and after the Conquest. It is substantially the same distinction as that marked in Roman law by the terms *manifestus* and *nec manifestus*.

[5] P. and M. ii 494; cp. vol. ii 48; 3 Edward I. c. 15 § 4, those indicted for larceny below the value of twelve pence are bailable; Y.B. 30, 31 Ed. I. (R.S.) 537; in Y.B. 30, 31 Ed. I. (R.S.) 533 previous larcenies were allowed to be proved to make up the amount, and this view is taken in the Eyre of Kent (S.S.) i 82; but these decisions were not followed, Y.B. 11, 12 Ed. III. (R.S.) 532.

[6] As Hale points out, P.C. i 530, the offence had some of the marks of felony; the indictment ran *felonice*, and on conviction the offender lost his goods.

grand larceny came to be a felony and therefore punishable with death is probably the reason why the distinction between manifest and non-manifest theft disappeared. Both were punished in the same way. The only difference was the mode of trial. The manifest thief was, as we have seen, put to death in summary fashion,[1] the non-manifest thief after a regular trial before the royal judges. Grand and petty larceny therefore remained as the only division between larcenies in the common law till 1827.[2]

The question what was the value of the goods stolen was a matter of fact for the jury. Already in Edward III.'s reign juries were beginning to use their power to save petty thieves from the gallows by depreciating the value of the stolen property. "One was arraigned for that he had stolen two sheep value twenty pence, and the jury found him guilty but they said that the sheep were only worth ten pence; wherefore he was remanded to prison as a punishment, and he will be liberated at the next session."[3]

This distinction between grand and petty larceny may show us that the law has always required that the things taken shall have some value. This in fact is a necessary requirement. "Otherwise it would be a crime to dip your pen in another man's inkstand, or to pick up a stone in his garden to throw at a bird."[4] Thus this consideration of value has not only caused the division of larceny into two species, it has also had some bearing on the question as to the things which can and the things which cannot be the subject of larceny.

(3) *Things not the subject of larceny.*

We find in the books a heterogeneous list of things which cannot be stolen;[5] and the comprehensiveness of the list has necessitated the passing of many statutes in order to fill up the many lacunæ thus appearing in the criminal law. Three main principles have been at work in the formation of this list. The first is based upon the idea of larceny as consisting of taking and carrying away. The second is based upon the idea that there can be no larceny of things which are not property because of no value. The third is based upon the idea that the stolen thing must have an owner. By virtue of the first principle, land and things annexed to land were not the subject of larceny. A man who cut and took away

[1] Above 319-320; below 608; P. and M. ii 495. [2] 7, 8 George IV. c. 29 § 2.
[3] Fitz., Ab. *Corone* pl. 451 (1368); see also 18 Ass. pl. 14.
[4] Macaulay, Indian Penal Code n. *N*, cited Kenny, Criminal Law 200.
[5] See Pollock and Wright 230-236; Stephen, H.C.L. iii 142-144; Hale, P.C. i 510-512.

trees did not commit larceny; though it would be otherwise if he had carried off trees already cut.[1] By virtue of the second principle it was held that such things as animals *feræ naturæ* could not be stolen if they were useful neither for food nor domestic purposes.[2] By virtue of the third principle animals *feræ naturæ*, unless confined, were again excluded;[3] and also such things as waif, wreck, or treasure trove.[4] But these principles were extended, not always very logically, owing perhaps to a feeling against capital punishment. They were not easy to keep apart; and it was possible to exclude the same thing on several grounds. Thus title deeds to land might be excluded, either because they were annexed to land, or because, being merely evidences of a right of entry or action, they were choses in action of no value. That they were excluded was settled at the end of this period;[5] and this exclusion was the foundation for the exclusion of all other choses in action[6]—a decision which involved, as Stephen points out, the absurd conclusion that a banknote cannot be stolen.[7]

Robbery.

Robbery is larceny aggravated by violence. It has been a felony certainly since the reign of Henry II.[8] Hale[9] defines it as "the felonious and violent taking away of any money or goods from the person of another, putting him in fear." Thus where two took hold of a man and made him swear on pain of death to bring them £1,000, it was adjudged to be robbery.[10] That the value of the property taken was immaterial was decided as early as Edward III.'s reign.[11]

[1] Y.B. 11, 12 Ed. III. (R.S.) 640.

[2] Y.B. 12 Hy. VIII. Trin. pl. 3, *Eliot* argued that things that are only useful for pleasure cannot be stolen, "Car une Dame qui ad un petit chien ne veut vendre ceo pur grand summe d'argent, et si un prend ceo, il n'est reason que elle aura action vers luy pur le plaisir que elle avoit en luy;" this view was pushed to an extreme by Hales, J., in Edward VI.'s reign, who ruled that it was no felony to take a precious stone, Stephen, H.C.L. iii 143.

[3] Y.B. 12 Hy. VIII. Trin. pl. 3, *Brudnel* said, "Pur ceo que tiels choses sont *feræ naturæ* et bestes sauvages jeo n'aurai appel de felony, pur ceo que jeo n'ay ascun propriete in eux, car nul poit dire *feras suas;*" 22 Ass. pl. 95 it was admitted that the law was otherwise if they were kept in confinement; for a modern application of this principle see R. v. Townley (1870) 1 C.C.R. 315.

[4] 22 Ass. pl. 99.

[5] Y.B. 49 Hy. VI. Mich. pl. 9, *Choke*, "Il semble que il n'est felony pour deux causes, l'un ils sont issint reals que il ne puit estre felony. . . . Auter cause est pour ce que ils ne poient estre values."

[6] "Un obligation n'est valuable mes un chose in accion," Dyer 5b (1533).

[7] Stephen, H.C.L. iii 144; Cayle's Case (1584) 8 Co. Rep. 32a. For the statutory modifications of these rules see Stephen, op. cit. 147-149—as he points out, a statute was passed as early as 1429 (8 Henry VI. c. 12 § 3) to make the stealing of records felony.

[8] P. and M. ii 492, 493.

[9] P.C. i 532.

[10] Y.B. 44 Ed. III. Pasch. pl. 32.

[11] Y.B. 13, 14 Ed. III. (R.S.) 352 = Fitz., Ab. *Corone* pl. 115.

Burglary.

It is probable that the nature of the crime which the common law knows as burglary was not completely determined in this period. According to Coke, "A burglar is a felon that in the night breaketh and entreth into the mansion house of another, of intent to kill some reasonable creature, or to commit some other felony within the same, whether his felonious intent be executed or not."[1] The Anglo-Saxons knew the crime of *hamsoken* or breaking into a house;[2] and Britton[3] tells us that those who feloniously break churches, houses, or the walls and gates of cities are burglars. But neither in Britton's definition, nor in the cases cited in Fitzherbert's Abridgment,[4] is the time of the commission of the crime an element in it. There was no doubt a disposition in some cases to regard certain crimes committed at night as more serious than if they were committed by day; and, as Maitland remarks, Bracton speaks of the crime of *hamsoken* in close connection with the fur nocturnus.[5] But probably the rule that burglary can only be committed at night is not much older than the sixteenth century. For the appearance of the word "*noctanter*" in the indictment Coke can cite no earlier authority than a case of Edward VI.'s reign;[6] and Staunford cites no authority at all —merely saying that for all that appears in the older authorities the crime might as well be committed by day as by night, but that the law is not so now.[7] As a matter of fact, certain cases of breaking into or robbing in dwelling-houses, whether by day or night, had been made felonies by statutes of Henry VIII., Edward VI., Mary, and Elizabeth's reigns;[8] and this may have led to the restriction of the common law felony. The result was that housebreaking in the daytime, unless it fell within some one of these statutes, sank to the level of a misdemeanour.

That the intent of the breaking and entering must be to commit a felony was settled as early as Henry IV.'s reign.[9] The questions what can be said to be a house and what will amount to breaking and entering have been elaborated by later decisions.

[1] Third Instit. 63.
[2] P. and M. ii 491, 492.
[3] Britton i 42.
[4] Fitz., Ab. *Corone* pl. 185 = 22 Ass. pl. 95; 264.
[5] P. and M. ii 492 n. 2.
[6] Third Instit. 63, citing Bro., Ab. *Corone* pl. 180 (2 Ed. VI.), and 185 (4 Ed. VI.); the latter entry runs, "Burglarie ne sera adjudge nisi ou le infriendre del meason est per noctem."
[7] P.C. i 24, "Et nota que pur ascun chose contenus in ceux livres [the Y.BB.] burglary peut estre fait auxi bien au jour come au nuit, etc. Mes le ley n'est issint prise, quar tous lenditementes de burglarye sont *quod noctanter fregit*."
[8] For these statutes see Hale, P.C. i 548
[9] Y.B. 13 Hy. IV. Mich. pl. 20 *per* Hankford; Fitz., Ab. *Corone* pl. 229.

Arson.

Arson, like burglary, is a crime against the sanctity of the homestead. It is described by Coke as "a felony at the common law committed by any that maliciously and voluntarily in the day or night burneth the house of another."[1] "House" in this definition is taken more largely than in the definition of burglary. "For the indictment of burglary must say *domum mansionalem*, but so need not the indictment of burning, but *domum*, viz. a barn, malt-house or the like."[2] From the Anglo-Saxon times arson was regarded as the worst of crimes;[3] and as late as John's reign the punishment was death by burning.[4] But the law on this point changed, and its punishment became the same as that of the other felonies—certainly as early as Edward II.'s reign.[5] From the first the element of malice was required—Bracton remarks that a fire caused merely negligently gives rise only to a civil action.[6] The common law crime of arson did not cover much ground. Some part of the building must have been burnt; and the building burnt must belong to, i.e. be occupied by, another, so that if a tenant burnt his house he did not commit arson.[7] As in other cases the crime has been largely extended by statute.[8]

The narrowness of the crime of arson at common law is the more remarkable when we remember that it was "the only form of injury to property that was recognized by the common law as a crime."[9] All other kinds of damage to property were treated simply as trespasses. Here, as in the case of offences to the person,[10] the civil aspect of trespass was dwarfing the criminal aspect; and, as I have said before, the wide field which the writs of trespass cover is the best proof of the scantiness of the criminal law. The man who has put a cat into his neighbours dove-cot,[11] or who has extracted wine from his neighbour's casks and filled them with sea water;[12] the man who has removed his neighbour's landmark,[13] or destroyed his neighbour's sea wall;[14] the man who has laid waste his neighbour's fields,[15] or besieged his house[16]—all are sued by an action of trespass. Moreover, the writs of trespass on the case were, as we shall see in the following section, beginning to lay the foundations of our modern law as to civil liability

[1] Third Instit. 66; Hale, P.C. i cap. xlix.
[2] Third Instit. 67.
[3] P. and M. ii 490.
[4] Gloucester Pleas pl. 216, cited P. and M. ii 490 n. 7; Britton i 41.
[5] Hale, P.C. i 566, citing H. 7 Ed. II. Coram Rege Rot. 88 Norf.
[6] Bracton f. 146b; P. and M. ii 491.
[7] Holmes's Case (1635) Cro. Car. 377.
[8] The various statutes are now consolidated by 24, 25 Victoria c. 97.
[9] Kenny, Criminal Law 166.
[10] Above 317-318.
[11] Register f. 106.
[12] Ibid f. 95b.
[13] Ibid f. 107b.
[14] Ibid f. 92b.
[15] Ibid f. 94.
[16] Ibid f. 95.

for wrongdoing, and, as we shall see in the following chapter, our modern law of contract.

§ 8. The Principles of Liability

In the thirteenth century there are many evidences that the old principles of liability as they existed in the days before the Norman Conquest were still remembered.[1] We have seen that a man who has killed another by misadventure, though he may deserve a pardon, is guilty of a crime; and the same rule applies to one who has killed another in self-defence,[2] and to one who is a lunatic[3] or an infant.[4] It is only in very exceptional cases that killing is absolutely justified.[5] A man is still liable for all the harm done by animals while under his control;[6] and the existence of the deodand testifies to a survival from the time when anything instrumental in doing the wrong was regarded as tainted with guilt.[7] It is true that a master is not necessarily liable for the wrongful acts of his servants; but we can see traces of the older principles under which he was held to be liable in the rule which made him responsible for the doings of his household or "mainpast;"[8] and in the rule which, as a condition of escaping liability, required him to swear that he had nothing to do with the wrongful act.[9] Even those who had acted under duress in times of war or rebellion did not escape scot free.[10]

All these survivals point to the permanence of the old principles; but the influence of the civil and canon law tended to make them look archaic. Bracton would have liked to rationalize the law by the aid of these more civilized systems.[11] But, as we have seen, they ceased to exercise any appreciable influence on the development of English law after the thirteenth century.[12] In working out the principles of liability, as in constructing a law of contract,[13] English lawyers were thrown back upon themselves, and were obliged to evolve by their own efforts the new principles demanded by an advancing civilization.

I shall deal in this section firstly with criminal, and secondly with civil liability. Though, as I have said, crime and tort are

[1] Vol. ii 50-54. [2] Above 312-313.
[3] P. and M. ii 478; Fitz., Ab. *Corone* pl. 412 (8 Ed. II.).
[4] Below 372; cp. Hale, P.C. i 24; the Register f. 309b—a pardon granted to a child under seven.
[5] Above 310-311, 312. [6] Vol. ii 47, 52. [7] Ibid 47.
[8] Below 383; cp. Fitz., Ab. *Corone* pl. 428 (8 Ed. II.).
[9] Bracton f. 204b; Bracton's Note Book Cases 779, 781; Y.B. 30, 31 Ed. I. (R.S.) 532.
[10] See extracts from the Dictum de Kenilworth, cited Hale, P.C. i 50, 51.
[11] Vol. ii 258-259. [12] Ibid 359, 452.
[13] Below 413.

not sharply distinguished in this period, the distinction is beginning to emerge; and it is in the different principles of liability which are applicable that it appears most plainly.

Criminal Liability

We have seen that by Edward I.'s reign the tender age of the delinquent was admitted as an excuse.[1] We have seen, too, that necessary self-defence, misadventure, or lunacy were admitted to be good grounds for mitigation of punishment.[2] These departures from the older principles continued all through this period to take the form simply of mitigations of punishment. But they tended to grow more precise; and their growing precision doubtless helped to develop the view that the proof of some of these facts should negative guilt.[3] This will clearly appear from the manner in which they are dealt with in the later law.

As early as Edward III.'s reign it was ruled that offences committed under compulsion in time of war or rebellion were excusable.[4] We have seen that the meaning of self-defence and misadventure was being more precisely defined.[5] With regard to crimes committed by children it was settled in later law that a child below the age of seven cannot be guilty of felony, that between seven and fourteen there is a rebuttable presumption to the same effect, and that over fourteen he is fully *doli capax*.[6] The law is not quite settled in this way in this period; but it is tending to such a settlement.[7] In Henry VI.'s reign Moile, J., was shocked that even a civil action for trespass to the person should be brought against a child of four.[8] Similarly madness, if it existed when the crime was committed, was a defence.[9] In

[1] Vol. ii 358 n. 8. [2] Above 312-313, 316.

[3] Cp. Y.B. 4 Hy. VII. Hil. pl. 3.

[4] Hale, P.C. i 49, 50, citing records of Mich. 21 Ed. III. Coram Rege Rot. 101 Linc., and Mich. 7 Hy. V. Coram Rege Rot. 20 Heref.; and cp. record of 14 Ed. II., cited at pp. 56-58.

[5] Above 313-314.

[6] Plowden 19 n. *f*; Hale, P.C. i 24-29; in the Eyre of Kent (S.S.) i 108 it was said that a child of twelve could not be outlawed because he "was not of a tithing nor sworn to the law."

[7] Y.BB. 3 Hy. VII. Hil. pl. 4, and Mich. pl. 8; 35 Hy. VI. Mich. pl. 18; so early as Edward II.'s reign the judges were applying the maxim "malitia supplet ætatem," the Eyre of Kent (S.S.) i 148-149; see also Fitz., Ab. *Corone* pl. 118 = Y.B. 11, 12 Ed. III. (R.S.) 627.

[8] Y.B. 35 Hy. VI. Mich. pl. 18, "*Moile* dit a *Wangford*, purres vous trouver en vostre conscience a declarer envers ce enfans de ceo tendre age? Jeo croy que il ne scait ascun malice, car il n'est person de grand pouvoir . . . et cum hoc *Moile* leve sus meme person, supporte l'enfans ove sa main, et luy mit en le Place, et dit a *Wangford*, icy est le person; et pur ceo advises vous."—All counsel could say was that he was instructed that the child had put out his client's eye.

[9] Under the older law the chattels were forfeited, Fitz., Ab. *Corone* pl. 412 (8 Ed. II.), but it was about this time the law was changing, as in a case of this kind in the

the case of damage done by animals, knowledge on the part of the owner that the animal was fierce was necessary to fix him with criminal, and perhaps even civil, liability.[1] We can see the beginnings of the rules which excused a wife in case of the commission of certain crimes under the coercion of her husband.[2] Both married women and infants were granted certain procedural privileges, based upon the presumption of their incapacity to understand and obey as a full-grown man.[3]

These rules make it clear that the law was laying more emphasis upon the ethical element in wrongdoing. It was beginning to be felt that the essence of the more serious crimes lay in the intent with which the act was done; and we even find cases in which the judges took the will for the deed, and punished the intent only, though the act was not accomplished.[4] This was a dangerous doctrine, but tempting perhaps at a time when there was no legislation directed against attempts to commit crimes. There is no evidence, however, that it was ever generally held in the case of ordinary felonies. It was only in the case of high treason that an intent was made criminal. The completed act was required together with an intent in all other cases.[5] But the common forms of presentments and indictments strengthened the idea that accompanying the act there should be an element of moral wrongdoing. Accordingly, in the later Year Books the felonies were differentiated from civil wrongs on this basis. "Felony," said Fairfax,[6] "is of malice prepense, and when an

Eyre of Kent of 6, 7 Ed. II. (i 81) the chattels were not forfeited; the law was settled in this way in Edward III.'s reign, Fitz., Ab. *Corone* pl. 244 (22 Ed. III.); see Hale, P.C. i 35, 36; 26 Ass. f. 123 pl. 27; Y.B. 21 Hy. VII. Mich. pl. 16; above 316.

[1] Fitz., Ab. *Corone* pl. 311 (1330), a presentment was made that a child had been killed by a cow, "et demande fuit si elle fuit accustome de male faire, et ils disent que oile; et demande fuit si le home fuit en vie que aver la jument, que disent que non; et dit fuit s'il ust estre en vie il ust estre arraigne de mort et amercy vers le roy; mes quatenus il connust sa maner il duist aver luy lie en un sur lieu."

[2] Hale, P.C. i 45, and the record cited at p. 47; 27 Ass. f. 137 pl. 40; Fitz., Ab. *Corone* pl. 160; Kelyng 31.

[3] They are not imprisoned according to the provisions of Stat. West. II. though they vouch a record and fail at the day, 13 Ass. pl. 1, cited Hale, P.C. i 20; an infant is not imprisoned though he fail to attach an offender, Fitz., Ab. *Corone* pl. 395; in Y.B. 12 Rich. II. 21 it is said that neither laches nor folly nor prejudice could be imputed to an infant; but the exact limits of these privileges were not clear, see the Y.BB. cited by Hale, P.C. i 21, notes *f*, *h*, and *i*.

[4] Fitz., Ab. *Corone* pl. 383 (15 Ed. II.); Stephen, H.C.L. ii 222; P. and M. ii 474 n. 5. This was a case of homicide; for similar rules in the case of larceny, robbery, etc., cp. Y.B. 25 Ed. III. Pasch. pl. 33; 27 Ass. pl. 38; Y.B. 13 Hy. IV. Mich. pl. 20; Staunford, P.C. i 20; Coke, Third Instit. 5; Ellesmere's judgment in Calvin's Case 2 S.T. at pp. 674-675; Hale, P.C. i 425-426, 532. Maitland thinks that the adoption of this maxim, *Voluntas reputabitur pro facto*, "was but a momentary aberration;" but Staunford, Coke, Ellesmere, and Hale treat it as seriously held in Edward III.'s reign.

[5] Above 315; Plowden 259; Coke, Third Instit. 5.

[6] Y.B. 6 Ed. IV. Mich. pl. 18; cp. 13 Ed. IV. Pasch. pl. 5 *per* Hussey, the Chancellor, and Molineux, above 361 n. 10.

act is done against a man's will there is no felonious intent." It may be that in civil cases the law will deem that the intent of a man is not triable;[1] but in criminal cases, as Rede, J., said, the intent shall be tried;[2] "for instance, if a man is shooting at the butts, and kills another, it is not felony, and it shall be accounted as if he had had no intent to kill him; and so in the case of a tiler on a house who with a stone kills a man unwittingly, it is not felony." In one of the cases of high treason, as we have seen, the intent itself—the compassing or imagining of the king's death—constituted the offence;[3] and it is just the presence or absence of this element of wrongful intention which differentiates felony from trespass. It is taken as one of the tests—perhaps the chief test—which distinguishes criminal from civil liability. It would not, of course, be true to say that it is or can be the only test. At all times the state may find it expedient to suppress acts which it deems to be dangerous by saying that those who do them are guilty of a crime, whether or not they had any intention to do the act in question.[4] Or, again, the state may find it convenient to presume a guilty intent from a course of conduct which appears to be dangerous.[5] In such cases as these a man may be held to be guilty of crime though he had no guilty intent at all, or no intent to commit the crime which the law imputes to him. But these are really exceptional cases. The general rule of the common law is that crime cannot be imputed to a man without *mens rea*.[6] It is, of course, quite another question how the existence of that *mens rea* is to be established. The thought of man is not triable by direct evidence; but if the law grounds liability upon intent it must endeavour to try it by circumstantial evidence. Much of that circumstantial evidence will be directed to show that a man of ordinary ability, situated as the accused was situated, and having his means of knowledge, could not have acted as he acted without having that *mens rea* which it is sought to impute to him. In other words, we must adopt an external standard in adjudicating upon the weight of the evidence adduced to prove or disprove *mens rea*. That, of

[1] *Per* Brian Y.B. 17 Ed. IV. Pasch. pl. 2; and cp. Y.BB. 33-35 Ed. I (R.S.) 326; 17, 18 Ed. III. (R.S.) 464; 20 Ed. III. (R.S.) ii 396.

[2] Y.B. 21 Hy. VII. Trin. pl. 5, "Coment que l'entente del defendant icy suit bon; uncore intant que l'entente ne puit estre construi: mes in felony il sera."

[3] Above 292.

[4] For a modern instance see Parker v. Alder [1899] 1 Q.B. 20; on this matter generally see Kenny, Criminal Law 46-47; R. v. Prince (1875) L.R. 2 C.C.R. 154; R. v. Tolson (1889) 23 Q.B.D. 168.

[5] See Stephen's Digest of Criminal Law, Art, 223, for the various states of mind which may constitute the "malice aforethought" which will make homicide murder.

[6] Williamson v. Norris [1899] 1 Q.B. at p. 14 *Lord Russell*, C.J., said, "The general rule of English law is that no crime can be committed unless there is *mens rea*."

course, does not mean that the law bases criminal liability upon non-compliance with an external standard. So to argue is to confuse the evidence for a proposition with the proposition proved by that evidence.[1]

Civil Liability

The mitigations existing at this period of the old strict principles of criminal liability are not found in the case of civil liability. The reason is well explained by Hale. He points out that such incapacities as infancy, madness, compulsion, or necessity do not excuse the person suffering from them from a liability to a civil action for damages for the wrong done, "because such a recompense is not by way of penalty, but a satisfaction of damage done to the party; but in cases of crimes and misdemeanours, where the proceedings against them are *ad pœnam*, the law in some cases . . . takes notice of these defects, and . . . relaxeth . . . the severity of their punishments."[2] Thus throughout this period the old ideas still dominated the principles of the law as to civil liability. The general rule is that a man is liable for the harm which he has inflicted upon another by his acts, if what he has done comes within some one of the forms of action provided by the law, whether that harm has been inflicted intentionally, negligently, or accidentally. In adjudicating upon questions of civil liability the law makes no attempt to try the intent of a man,[3] and the conception of negligence has as yet hardly arisen. A man acts at his peril.

It is not difficult to illustrate these conceptions from decided cases. In the Year Book of 6 Edward IV.[4] a case is reported, the facts of which are as follows: The plaintiff brought trespass against the defendant for breaking his close and trampling down his grass. The defendant pleaded that he was cutting thorns upon his own land, that some of the thorns fell, *ipso invito*, on the plaintiff's land, that he came at once on to the plaintiff's land and collected them, and that this was the trespass complained of. The court held that this plea disclosed no defence; and the reasoning of Brian and Littleton shows clearly that the old ideas still held their ground. Brian said, "When a man does a thing he is bound to do it in such a way that by his acts he causes no damage to others. If, for instance, I am building a house, and

[1] See Angus v. Clifford [1891] 2 Ch. at p. 471 *per* Bowen, L.J.

[2] Hale, P.C. i 15, 16. There were some few cases in which laches would not prejudice an infant in other than criminal proceedings (see Litt. §§ 402, 403 and Coke's comment); but these cases relate chiefly to real actions, and have little bearing on criminal or delictual liability.

[3] Above 374 n. 1.

[4] Y.B. 6 Ed. IV. Mich. pl. 18; Holmes, Common Law 85-87.

while the timber is being put up into position a piece falls on my neighbour's house, he will have a right of action, though the building of the house was lawful, and the timber fell *me invito*. So, too, if a man assaults me, and I cannot avoid him, but as he is about to hit me, I in my defence raise my stick to strike him, and there is one behind me, and in raising my stick I hurt him, in this case he has a right of action against me, though the raising of my stick in self-defence was lawful, and though I hurt him *me invito;* so in this case." Littleton said, "If your cattle come upon my land and eat my grass, though you come at once and drive them off, you must make amends for what your cattle have done. . . . And, sir, if it is law that he can enter and take the thorns, by the same reasoning if he cut down a great tree he could come with carts and horses and carry away the branches, which is clearly against reason, for there might be corn there or other growing crops; no more can he do such a thing in this case, for the law is the same for small things as for great, and according to the extent of his trespass he must pay damages." It is clear from the language used in this case that the plea of accident was no defence in an action for trespass, either to the person or to property; and there are other decisions which lay down a similar rule.[1] This principle seems to have been applied whether the damage were done by a man's animals or by himself.[2] On the same principle the law declined to excuse lunatics and infants[3] who by their acts had damaged another. The state might remit penalties,[4] but they were civilly liable like any one else to pay damages to the injured party. Bacon, in his Maxims, accurately summed up the law as it existed then and in his day.[5] "In capital cases, *in favorem vitæ*, the law will not punish in so high a degree, except the malice of the will and intention do appear; but in civil trespasses and injuries that are of an inferior nature, the law doth rather consider the damage of the party wronged, than the malice of him that was the wrongdoer. . . . So if a man be killed by misadventure, as by an arrow at butts,

[1] Y.B. 35 Hy. VI. Mich. pl. 18, above 372 n. 8. *Moile* appeals to counsel not to go on with the case against the child because he could not have known what he was doing, so that there could hardly be said to be an act in this case; but he seems to admit that if the child pleaded and was found guilty the judge would have no discretion; Y.B. 21 Hy. VII. Trin. pl. 5; see a similar rule applied to liability for waste, Y.B. 19 Ed. III. (R.S.) 194, 196. It was otherwise if the act was done with the assent of the plaintiff so that the maxim, *volenti non fit injuria* was applicable, Y.B. 12 Rich. II. 125.

[2] Y.BB. 10 Ed. IV. Pasch. pl. 19; 20 Ed. IV. Mich. pl. 10; as to dogs and the *scienter* rule, see below 381.

[3] Y.B. 2, 3 Ed. II. (S.S.) 112—the parol will not demur for the defendant's nonage if he is personally charged with tort; below 515, 516.

[4] Above 372.

[5] Bacon, Maxims, Regula vii, Works (ed. Spedding) vii 347, 348.

this hath a pardon of course; but if a man be hurt or maimed only, an action of trespass lieth, though it be done against the party's mind and will, and he shall be punished in the same as deeply as if he had done it of malice. . . . So if an infant within years of discretion, or a madman, kill another, he shall not be impeached thereof; but if he put out a man's eye, or do him like corporal hurt, he shall be punished in trespass."

This strict theory of civil liability is quite consistent with the fact that the law occasionally allows that certain kinds of harm may be justifiably inflicted.

In the first place, in the public interest, the law must make some exceptions of this kind to its theories of liability; and the public interest demands that such exceptions shall be made to the usual rules of civil no less than to the usual rules of criminal liability.[1] In 1293 the fact that the hue and cry had been raised and that the plaintiff had been in consequence attached and imprisoned for failure to find pledges was considered to be a good defence to an action for trespass.[2] In Henry VII.'s reign the general principle of such cases was explained by Kingsmill, J.[3] "When the goods of anyone," he said, "are taken against his will, the taking must be justified either because it is necessary for the Commonwealth or because of a condition in law. Firstly, for a matter concerning the Commonwealth a man shall justify the taking of goods out of a house when that is necessary for the safety of the goods, or the pulling down of a house for the safety of others. So in time of war a man shall justify an entry upon another's land to make a bulwark for the defence of king and realm, and these things are justifiable and lawful for the maintenance of the Commonwealth. And secondly, when a man distrains my horse for his rent it is justifiable, because the land is bound by this condition of distress; and so of other conditions. And so by these two ways a man can justify the taking of a thing against the owner's will."

In the second place, other exceptions are needed for the adequate protection of private rights. For this reason, if an act causing damage and otherwise actionable was done in the necessary defence of the defendant's person, or in the exercise of his rights of property, no cause of an action arose. Thus in a case of Henry IV.'s reign,[4] which has already been cited, it is laid down that if A is about to assault B, B need not wait till he is actually hit, "for peradventure his blow will come too late;"

[1] Above 310-311, 312.
[2] Y.B. 21, 22 Ed. I. (R.S.) 184.
[3] Y.B. 21 Hy. VII. Trin. pl. 5; cp. Y.B. 19 Ed. III. (R.S.) 196; Mouse's Case (1609) 12 Co. Rep. 63.
[4] Y.B. 2 Hy. IV. Mich. pl. 40.

and on similar principles a battery by a master in defence of his servant or *vice versâ* was held to be justifiable.[1] In Edward III.'s [2] reign, in an action for trespass in breaking a close, it was held that it was a good defence to plead that the place was common, that the defendant was a commoner, and that he had broken the close for the purpose of exercising his right of depasturing his cattle. In these cases, though the defendant's act may have caused damage, he had not exposed himself to liability, because he had merely been exercising his legal rights.

Obviously there is no departure from, but rather an illustration of the general principle on the rule that, if the act which caused the damage was the act of the plaintiff himself, then it is no cause of action. This rule is established by a case of Edward IV.'s reign,[3] the facts of which were as follows: The plaintiff had a close adjoining the king's highway, and he sued the defendant for damages caused by the entry into his close of the cattle which the defendant was driving along the highway. The defendant's plea was that the close was not kept properly secured, and that it was the defect in the closure which caused the damage. The court held this a good plea. "If," said Moile, J., "a man has a close which he has enclosed from time immemorial, and adjoining that close I have a way for the purpose of driving my cattle to such a place, if the close lies open, and my beasts being driven along the way enter, he will have no right of action against me."[4] It is to be observed that this is exactly the substance and meaning of that miscalled doctrine "contributory negligence."[5] According to this doctrine, when the plaintiff's own act is the effective cause of the damage which he has suffered, he cannot recover. But this rule of law arose at a time when the common law had no doctrine of negligence. The result is that the name given to the doctrine does not fit in with its actual meaning; nor does this actual meaning fit in quite harmoniously with a system of civil liability which is supposed to be based

[1] Y.BB. 20 Ed. III. (R.S.) i 502; 19 Hy. VI. Mich. pl. 59; 35 Hy. VI. Hil. pl. 15; 21 Hy. VII. Mich. pl. 50—it is noted in the last cited case that a battery in consequence of mere threats to assault is not justifiable.

[2] Y.B. 11, 12 Ed. III. (R.S.) 184-187, *per* Sharshulle, J.; cp. Y.B. 17, 18 Ed. III. (R.S.) 628, 630—a plea to an action of trespass for carrying off lead that the lead belonged to the defendant: and cp. Y.B. 21 Hy. VII. Mich. pl. 50 as to the right to resist a riotous assault on one's house.

[3] Y.B. 10 Ed. IV. Pasch. pl. 19; the rule was the same in criminal cases, Fitz., Ab. *Corone* pl. 94 (44 Ed. III.).

[4] Cp. also Y.B. 11 Ed. IV. Trin. pl. 6, "Si home moy vende un chival et garrantie qu'il ad deux ocules, s'il n'ad il n'avera accion de Disceit car jeo puis avoir conusans de ceo al commencement."

[5] I say "miscalled" because, as Sir F. Pollock says (Torts, 5th ed. 430), "It rather suggests as the ground of the doctrine that a man who does not take ordinary care for his own safety is to be in a manner punished for his carelessness by disability to sue anyone else whose carelessness was concerned in producing the damage."

upon negligence. For, "if the defendant could finally have avoided the mischief by ordinary diligence, it matters not how careless the plaintiff may have been at the last or any preceding stage;"[1] and the converse of this proposition is equally true. If we are basing our theories of civil liability upon the fact that the defendant has acted negligently to the damage of the plaintiff, and not merely upon the fact that he has acted to his damage, the justice of this rule seems questionable. It is not surprising that a doctrine called by this misleading name, and leading to results which do not harmoniously fit in with modern ideas as to the incidence of civil liability, should have given rise to many doubts and much discussion in modern times. All this we shall see when, in the following Book of this History, I relate the later history of this doctrine.[2]

It should be noted that this case clearly shows that a man is not liable unless his act is the proximate cause of the damage. We have got far away from the old ideas which disregarded the remoteness of the damage.[3] A man acts at his peril; but it is the immediate and not the remote consequences of his act which imperil him. It is to this limitation of liability to the proximate consequences of a man's act that we must look for one of the causes which will in time partially subvert the older theory by introducing the conception that liability is based upon some shortcoming of the defendant rather than upon his acts. The only principle upon which we can justify the limitation of the defendant's liability to the proximate consequences of his acts is, to use the words of Holmes, the principle that, "if the intervening events are of such a kind that no foresight could have been expected to look out for them, the defendant is not to blame for having failed to do so."[4] This is clearly true if we strictly analyse the reason why we limit the liability of a man for an act causing damage to the proximate consequences of that act. But in this period this limitation of liability was perhaps accepted as a measure of obvious justice without a precise analysis of its consequences and bearing upon the prevalent theory of civil liability. The conception of negligence is latent in such a

[1] Pollock, Torts 431.

[2] Bk. iv. Pt. II. c. 5 § 6.

[3] Vol. ii 52.

[4] Common Law, 92, "If running a man down is a trespass when the accident can be referred to the rider's act of spurring, why is it not a tort in every case . . . seeing that it can always be referred more remotely to his act of mounting and taking the horse out? Why is a man not responsible for the consequences of an act innocent in its direct and obvious effects, when those consequences would not have followed but for the intervention of a series of extraordinary, although natural, events? [He would have been liable in the old days, vol. ii 52.] The reason is that, if the intervening events are of such a kind that no foresight could have been expected to look out for them, the defendant is not to blame for having failed to do so."

limitation; but in this period this latent consequence has not been discovered.

This rule, therefore, does not conflict with the leading principle of the mediæval common law that a man acts at his peril. It is true that we can now see that the limitation of the defendant's liability to the proximate consequences of his acts will necessarily lead to some modification of this theory; but this effect of the limitation is not as yet realized. It is to another quarter that we must look for the earliest conscious modification of this theory of civil liability. As we shall see, it does not, even at the very end of the period, carry us very far.

It was settled in Edward III.'s reign that if damage were caused to a barn by a sudden tempest no writ of waste would lie against the tenant, even though the tenant had covenanted to restore the barn in good condition.[1] In other words, necessity caused by an "act of God" is a good defence to an action, because the act causing damage is not the act of the defendant. This principle was admitted by Choke, J., in the "thorns case" discussed above.[2] "To plead," he said, "that the thorns fell *ipso invito* is no good plea, but he must say that he could do it in no other manner, or that he did all that he could to keep them on his ground—otherwise he is answerable for damages; and, sir, if the thorns or a great tree had been blown down, in that case he might have entered the defendant's land to take them, *because the fall was not his act, but the act of the wind.*" The concluding words made it pretty clear that Choke had no sort of idea of negligence in his mind.[3] He was merely putting the case of a necessity so strong that it negatived the idea that an act causing damage had been done by the defendant. To say that a defendant is not liable in such a case is perfectly consistent with the general principle of the law. But when the law improved upon this idea and excused defendants, not only in cases of necessity, but also in cases of what we may call convenience amounting to necessity, we do see a small departure from the rigidity of the older principle. Thus in Edward IV.'s reign[4] it was said that if a drover was driving cattle along the

[1] Y.B. 43 Ed. III. Hil. pl. 16; this is assumed in Y.B. 18 Ed. III. (R.S.) 212—though the court denied that the principle was applicable in the case before it.

[2] Above 375-376; and cp. Y.BB. 20 Ed. III. (R.S.) i 82-86; 33 Hy. VI. Hil. pl. 3 for other instances of this principle.

[3] But see Holmes, Common Law 103, for another view. In Stanley v. Powell [1891] 1 Q.B. 86 it was decided that for merely accidental trespasses to the person no action lies; but the decision was based mainly on authorities subsequent to the Y.BB.; the only Y.B. cited in the judgment is 21 Hy. VII. Trin. pl. 5 (below 381); though the decision is both good sense and accepted as good law, we may doubt whether it would have been arrived at in our period; for the later development of the law see Bk. iv. Pt. II. c. 5 § 6.

[4] Y.B. 22 Ed. IV. Pasch. pl. 24.

highway and by chance they got a mouthful of corn, no action lay; and, in the same case, that if in ploughing the plough turned upon another's land, it was generally held to be the custom of the country that such trespass gave no cause of action. We should note, however, that in both cases the exception was pleaded as a special custom of a county, though, as Brian said, it was a very general custom.[1] So in Henry VII.'s reign Rede, J., said,[2] "that if my cattle are with your cattle in a field I may drive all the cattle together until I get them to a strait place where they can be severed." Perhaps too we should class under this head the rule, if rule it was at this period, that damage done by a dog was not actionable unless his master knew him to be savage.[3] It is clear that if the principle of such decisions is extended; if they become confused with cases in which the defendant is excused because his act is justifiable, or because the plaintiff's act was the proximate cause of the damage, or because he acted in his own defence; if all these causes of excuse are considered in conjunction with the rule that the defendant is only answerable for the proximate consequences of his actions, a door will be opened to the weakening of the old rigid principle, and an opening will be made for basing liability upon the quality of the act which had caused damage, and not merely upon the act itself. It is clear, too, that with the widening of the area of civil liability rendered possible by the widening scope of writs of trespass on the case, some such development will be necessary. But at the end of our period this process has not gone far. We merely see faint indications of the quarters from which a change may come. When that change has come abundant traces will remain in the law of the mode in which it has been produced. As Professor Wigmore says,[4] "Inevitable necessity, unavoidable accident, could not act otherwise, seem indiscriminately to hit off in judicial language the reasons of justice on which they equally exempted him who acted in self-defence, and him who had not been to blame for what we now

[1] *Brian* al *Townshend*, "Ils font en mon country come *Suliard* dit en chescun country que jeo scay, forsque en votre paies, c'est a savoir en Norfolke, lou vous gages votre chivalx, issint que ils ne poient issint faire. Et la justification fuit agard bon, si la custome soit tiel come il ad suppose."

[2] Y.B. 21 Hy. VII. Trin. pl. 5 (at p. 28).

[3] Y.B. 20 Ed. IV. Mich. pl. 10 would seem to negative the scienter rule; cp. however, Fitz., Ab. *Corone* pl. 311 cited above 373 n. 1, and the writ in the Register f. 110b, "Canes ad mordendas oves consuetos apud B scienter retinuit;" but it should be observed that the Register f. 111a contains a precedent of a writ for damage done by a boar in which scienter is also alleged, though there is no allegation, as in the case of the dog, that it was accustomed to bite; it would, I think, be dangerous to use these phrases in the writs as evidence of any particular principle of liability; for the later developments of the law see Bk. iv Pt. II. c. 5 § 6.

[4] H.L.R. vii 443.

call negligence, and him who trespassed on the plaintiff's land to avoid highway attack. The phrases *non potuit aliter facere* and inevitable necessity served as leading catchwords for many centuries; and even up to the nineteenth century we find court and counsel constantly interchanging inevitable accident and absence of negligence and blame." As I have said above, we can want no better illustration of the manner in which the modern doctrines of negligence have been imposed upon a set of primitive conceptions which did not know such doctrines than the comparison between the title of the doctrine called contributory negligence and its actual meaning. And though the conception that negligence is a ground of liability has modified our ideas of civil liability for injuries to the person,[1] the old conceptions still in substance remain in our modern law as to liability for acts which infringe upon another's possession or right to possess land or chattels. A man is liable if by his act he infringes upon or damages in any way his neighbour's possession or rights to possess. We can no doubt explain this in a modern way by saying that every man ought to know the titles to his own property, or, if he is authorized to deal with another's property, that he should get proof of that other's title to give the authority; and that he is negligent if he does not possess this knowledge or take these precautions.[2] But, however, we explain it, the fact remains that our modern law on this point is in substantial agreement with the conceptions of the mediæval common law. With the historical reason for this survival of mediæval principles I shall deal later.[3]

Though these mediæval doctrines as to civil liability may sometimes have operated severely, they tended to a diminution in severity in that branch of the law which deals with the liability of a master for the acts of his servants. We have seen that in early law the master was absolutely liable for the wrongful acts of his servants, or perhaps we should rather say his slaves.[4] We have seen, too, that in Bracton's day the master escaped from criminal liability, unless the crime had been committed by his command and consent.[5] All through this period the law as to civil liability was tending to follow the law as to criminal liability.[6] In 1292, upon an allegation being made that a deed had been taken and torn up by the bailiff of a certain lady, Berewicke, C.J., said, "The lady committed no tort, even if her bailiff did as you have stated; but it was the bailiff who committed the tort; and your action against the lady's bailiff is

[1] Stanley v. Powell [1891] 1 Q.B. 86.
[2] Holmes, Common Law 98.
[3] Bk. iv Pt. II. c. 5 § 6.
[4] Vol. ii. 47.
[5] Above 371 n. 9.
[6] H.L.R. vii 384.

saved." In consequence of this ruling counsel was driven to aver that the taking and tearing were by command of the lady.[1] Perhaps the process was helped by the fact that the action of trespass, the chief action for the redress of civil wrongs, was in its origin of a semi-criminal nature. But the law of civil liability followed the law of criminal liability more slowly. We find, especially in the local courts, remembrances of old rules which made the master liable for the acts of his mainpast, or the father liable for the acts of his children.[2] Even when these old rules were forgotten or overruled by the royal courts,[3] even when the independent labourer had largely supplanted the dependent villein,[4] public policy prevented the test of command and consent from being applied as thoroughly in the sphere of civil as in the sphere of criminal liability.

We get a statement of the general principle in a clause of the Statute of the Staple[5] (1353), which was intended to make the common law rule the rule for the merchants resorting to the staple towns, except in so far as it was contrary to mercantile custom. "No merchant," it is said, "or other person, of what condition so ever he be, shall lose or forfeit his goods or merchandise for any trespass or forfeiture incurred by his servant, unless his act is by the command and consent of his master."[6] The reason for this principle was really the prevailing view as to the ground of civil liability. "It would be against all reason," said counsel in Henry IV.'s reign,[7] "to impute blame or default to a man, where he has none in him, for the carelessness of his servants cannot be said to be *his act*." In strict accordance with this conception Martin, J., in Henry VI.'s reign, explained the manner in which the master might incur liability, and the

[1] Y.B. 20, 21 Ed. I. (R.S.) 64.

[2] The Court Baron (S.S.) case 13, a father is made liable for his son's theft of apples from the lord's garden because he is his mainpast; see also case 34 and p. 127; and this liability seems to have been enforced in the Eyre of Kent of 1313-1314, the Eyre of Kent (S.S.) i 67, 90, 95.

[3] Y.B. 30, 31 Ed. I. (R.S.) 202, "A poor woman complained that B had deforced her by frequent distresses and had taken from her 100s. *B.*—Not guilty. *The Inquest* said that the woman's son whom she was bringing up at home had committed damage in B's wood, and that B came and took 2s. from the woman. *Berewick*, J.—And inasmuch as he did wrong to distrain the woman on account of her mainpast the court adjudges that she do recover her 2s. and her damages of 6d.; and that B be in mercy."

[4] The Court Baron (S.S.) case 36 note, a defendant denies that two persons, for whose acts he was sought to be made liable, were his mainpast, and alleges that they were hired labourers.

[5] 27 Edward III. st. 2 c. 19.

[6] We shall see, below 387, that certain provisoes are introduced which limit the generality of the principle; but the principle so stated is obviously the rule, and the provisoes are in the nature of exceptions.

[7] Y.B. 2 Hy. IV. Pasch. pl. 5, "*Hull.*—Ceo serra encounter tout reason de mitter culpe ou default en un home, lou il n'ad nul en luy, car negligence de ses servants ne poit estre dyt son fesauns."

extent of that liability.[1] Rolf, *arguendo*, had said, "If I have a servant who is my factor, and he goes to a fair with a lame horse or other defective merchandise and sells it, shall the purchaser have an action of deceit against me? Why, no." *Martin* replied, "No, not if you did not command the sale of the thing to that purchaser or to any one in particular; but if your servant by your consent and command sells any one bad wine, the purchaser will have a right of action against you, for it is then your sale. And if it be the case that you did not command your servant to sell to such person, then you can say that you did not sell to the plaintiff." "It would be dangerous indeed to leave such a fine distinction in matter of law to the jury," was Rolf's comment. It is clear from this statement that the law was very far from having reached the idea that a servant who does wrong while acting within the scope of his authority will render his master liable. He will only render his master liable if he does that very thing which his master commanded him to do, and if that thing is a wrongful act. It is only if the act of the servant is the act of the master that the master can be held liable. It is clear from this that a master's liability on his servant's contracts and his liability on his servant's wrongful acts were governed by the same principle. It was really a question of agency; and this followed from the prevailing theory of the law that it was an act causing damage which exposed to liability; for unless the master had commanded or consented to the servant's act it could not be said to be his act.[2]

It followed from this that if the servant did a wrongful act without the command or consent of his master the servant alone was liable. On the other hand, if the master commanded the servant to do a lawful act, and damage occurred through the subsequent wrongful act of the master, the master alone was liable. "Put the case," said Rede, J.,[3] "that the master commands the servant to distrain, and he does so, and brings the

[1] Y.B. 9 Hy. VI. Mich. pl. 37. It was held that where an agent bought corn and left a bullock with the vendor on the terms that the vendor should keep the bullock if the corn was not paid for, and the corn was used by the principal, the principal was liable if he took the bullock from the vendor; obviously there was a ratification of the agent's act, 27 Ass. pl. 5.

[2] The Doctor and Student Bk. ii c. 42 treats the liability of the master for the servant's wrongful acts and his liability on the servant's contracts as being part of the same subject, and as being substantially dependent on the same principles; compare, for instance, the dicta of Martin, J., cited above, and the following extract from this chapter: "If a man send his servant to a fair or market to buy for him certaine things, though he command him not to buy them of no man in certaine, and the servant doth according, the master shall be charged; but if the servant in that case buy them in his owne name, not speaking of his Maister, the Maister shall not be charged, unless the things bought come to his use."

[3] Y.B. 20 Hy. VII. Mich. pl. 23; cp. S.C. 21 Hy. VII. Hil. pl. 21.

distress to his master, and the master then damages the property, is there any reason to punish the servant? Certainly not. And if the master commands the servant to distrain, and the servant does so, there is no reason why, if the servant damages the property, the master should be punished for a command the giving of which was lawful." It equally followed that if a master gave a command to a servant to do an unlawful act, and the servant obeyed that command, both the master and the servant were liable. "If," said Yelverton,[1] "one by my consent and command takes the goods of another person, or beats him, the writ is maintainable both against him who did the deed and against me."

Such were the general principles which governed the liability of masters for their servants' misdeeds. They were, as I have said, logical deductions from the prevailing principles as to civil liability. But there were certain cases in which a greater extension was given to the master's liability upon grounds of public policy. In certain cases the master was regarded as being under a legal duty to avoid certain kinds of acts which were obviously dangerous. In these cases, if an act of this kind were done, either by the master or by his servants or by other persons for whom he was regarded as being responsible, and damage was caused, the master was held to be liable, because he had failed in the duty which the law had placed upon him.

(1) One of the most important of these cases was the liability for damage by fire. The law imposed a duty upon all householders to keep their fires from damaging their neighbours. Hence if a fire arose in a house by the act of any of the servants or guests, and damage was caused to the houses of others, the owner was liable. He could only escape from liability if he could show that the fire had originated from the act of a stranger.[2] (2) We have seen that mediæval society was regarded as divided into very distinct orders of men, each to a certain extent bound by the particular rules which applied to that particular order—each holding a particular "status" regulated by law.[3] Persons like innkeepers or common carriers, and perhaps persons like smiths or surgeons, were considered to be bound by their calling to show a certain degree of skill in their respective callings. If they did

[1] Y.B. 21 Hy. VI. Pasch. pl. 6.

[2] Y.B. 2 Hy. IV. Pasch. pl. 6, "Si mon servant ou mon hosteller mette un chandel en un pariet, et le chandel eschiet en le straw, et arde ma meason et le meason de mon vicine auxi, en cest cas jeo respondra al mon vicine de damage que il ad, *quod concedebatur per curiam*. . . Mes si home de hors ma meason encounter ma volunte boute la fewe en le straw de ma meason . . . de ceo jeo ne serra pas tenus de responder a eux;" for the later history of this rule see Bk. iv Pt. II. c. 5 § 6.

[3] Vol. ii 464-465.

not show this degree of skill they were liable to an action of trespass on the case for negligence.[1] Similarly persons like taverners, vintners, or butchers, whose business it was to sell food, were liable to an action of deceit on the case if they sold unwholesome food, whether or not they had made representations as to the quality of the food.[2] The ground for allowing an action in tort in both these classes of cases was at bottom public policy. It was for the interest of the community—then as now—that persons who professed a particular calling should show an adequate amount of care, skill, and honesty in following their calling. They could, therefore, be sued in tort if they did not come up to the standard imposed by the law.[3] Clearly this liability would not have been an adequate safeguard to the public unless the persons professing such skill had been made liable, not only for the acts done by themselves, but also for the acts done by their servants in the pursuit of their several callings. Therefore in these cases this extended liability was imposed.[4] (3) We shall see that if a person undertook to do work for another, and did it badly, so that the other person was damaged, an action lay;[5] and that action lay whether the work had been actually done by the person who had undertaken or his servant. Indeed, it might well be that the master was liable and the servant was not, for the ground of the master's liability was his undertaking and the damage which resulted from its non-fulfilment. The servant who

[1] Y.B. 11 Hy. IV. Hil. pl. 18 *Thirning* said, "Coment que un home que n'est my commen hostler, moy herberge en son hostel, il ne respondra pas de mes biens, *quod fuit concessum;*" Y.B. 19 Hy. VI. Hil. pl. 5 *Paston*, J., said to Markham, "Vous n'avez mettre que il est un common mareschal a curer tiel cheval; en quel cas, mesque il tua votre cheval per ses medicines, uncore vous n'aurez accion vers luy sans assumption;" cp. the Register f. 104, "Cum secundum legem et consuetudinem regni nostri Angliæ hospitatores qui hospitia communia tenent ad hospitandum, etc. . . . teneantur."

[2] Y.B. 9 Hy. VI. Mich. pl. 37, "*Babington.*—Si jeo vien en une taverne a manger, et il don ou vend a moy bier ou chair corrupt, pur le quel jeo suis mis en grand infirmite, j'aurai action envers luy sur mon cas clerement; et uncore il ne fist garrante a moy. *Godred.*—Fuit adjudge or tard en Bank le Roy que un vendist un piece *de panno laneo sciens ipsam raucam* et nemy bien fulle, et ceo fuit adjudge bon sans garrante. Et puis *Weston* dit que le bref fuit warrant. *Et sic fuit.*"

[3] Holmes, Common Law 184. Such persons are sometimes said to be liable by the "common custom of the realm," above n. 1; as Holmes says op. cit. 188, "The allegation did not so much imply the existence of a special principle as state a proposition of law in the form which was then usual;" this is stated in so many words in Y.B. 2 Hy. IV. Pasch. pl. 5, "*Hornby.*—Judgment de count, car il ad count, d'un common custom del realme, et n'ad my dist que cest custome ad estre use. A que *tota curia* dit passez ouster car comen ley de cest realme est comen custome de realme."

[4] Y.BB. 11 Hy. IV. Hil. pl. 18; 9 Hy. VI. Mich. pl. 37; 19 Hy. VI. Hil. pl. 5 cited above n. 1; Doctor and Student, Bk. ii c. 42, "If a man desire to lodge with one that is no common hosteler, and one that is servant to him that he lodgeth with, robbeth his chamber, his master shall not be charged for that robbing; but if he had been a common hosteler he should have been charged."

[5] Below 429-431.

had made no such undertaking was not liable. As Choke, J., put it,[1] "If a man undertakes to cure me of a certain disease, and he gives me medicine which makes me worse, I shall have action on my case against him; but if he thus undertakes and then commands his servant to administer the medicine, and the servant does so and I am made worse, I have no action against the servant but against the master." (4) By statute in certain cases bailiffs, sheriffs, and others were made liable for all the misdeeds of their servants in or about the duties pertaining to their office.[2] (5) The clause of the Statute of the Staple[3] which, as we have seen,[4] states the general principle applicable to the master's liability for the torts of his servant, indicates that that principle was sometimes modified by mercantile custom. The master may be liable if the servant has "misbehaved in the office in which he has been placed by his master," or if "his master is otherwise bound to answer for the act of his servant by the Law Merchant, as has been heretofore customary."

At the end of the seventeenth century some of the ideas contained in some of these exceptions to the general principle governing the master's liability for the torts of his servants will help the common law to the attainment of another view as to the extent of that liability. But we shall see that this new view was not merely a development from these exceptions. It was a new departure necessitated by the growth of England's industry and commerce, and by the fact that the victory of the common law courts over the court of Admiralty had added the new field of mercantile jurisdiction to the common law. Naturally, therefore, its origin, like the origin of other doctrines of mercantile law which were then appearing in the common law courts, owed something to those rules applied in the court of Admiralty, which the common law courts took over when they absorbed the mercantile jurisdiction formerly exercised by that court.[5]

In conclusion it should be noted that these mediæval principles of civil liability have in England an importance beyond that which they possess as a branch of private law. They were in the future destined to leave deep marks upon that part of our constitutional law which determines the relation of the crown and its servants to the public. In fact, some of the best weapons

[1] Y.B. 11 Ed. IV. Trin. pl. 10; cp. Ames, Lectures on Legal History 132, and Bl. Comm. i 418 there cited.

[2] 14 Edward III. st. 1 c. 9; 25 Edward III. st. 5 c. 21 § 6; 2 Henry VI. c. 10; 23 Henry VI. c. 1; Doctor and Student Bk. ii c. 42; Lord North's Case (1558) Dyer 161a; Plummer v. Whitchcroft (1676) 2 Lev. 158.

[3] 27 Edward III. st. 2 c. 19.

[4] Above 383.

[5] Bk. iv Pt. II. c. 5 § 6.

in the arsenal of the parliamentary lawyers of the seventeenth century were deductions from them; and the victory of the Parliament, by establishing the supremacy of the common law, gave these principles a great place in English public law. Thus the rules explained by Kingsmill, J.,[1] as to the circumstances under which an interference with another's property was justifiable were the bases of Holborne's argument in the *Case of Ship Money;*[2] and at the present day they are the basis upon which the powers of the crown and its subjects and servants to deal with riot or rebellion or invasion—sometimes miscalled martial law—rest.[3] Similarly, it is these mediæval rules as to the liability of masters and servants for wrongful acts which are the basis of the present law which determines the liability of the servants of the crown to the public for their wrongful acts. The king is a master who is in a peculiar position because he cannot be sued.[4] But this peculiar position, the lawyers of the fifteenth century held, limited his powers to act because, if the law was otherwise the subject would be deprived of all remedy for his unlawful acts.[5] He must act through a servant, and all servants of the crown are liable if they do or command others to do illegal acts. But, however exalted their position, they are but servants; and, since it has been held to be impossible to extend the modern principle of employer's liability to their employer, the crown, their liability still depends upon the principles of the mediæval common law[6]—a result which sometimes makes for serious injustice in these days of constantly increasing state activity.[7]

§ 9. Lines of Future Development

From the earliest times the royal judges had assumed jurisdiction to enforce the public duties of citizens, and the regular performance of the various functions both of the communities of the land, and of subordinate courts and officials.

The law made it the duty of every citizen to disclose any treason or felony of which he had knowledge, and a person who

[1] Above 377.

[2] (1637) 3 S.T. at 975.

[3] Vol. i 578.

[4] For this rule and the later deduction from it that the king can do no wrong, see below 465-466.

[5] Y.B. 1 Hen. VII. Mich. pl. 5, "*Hussey*, Chief Justice, disoit que *Sir John Markham* disoit au Roy Ed. le 4 qu'il ne poit arrester un home sur suspeceon de treason ou felon, sicome ascuns de ses lieges puissent, parce que *s'il face tort*, le party ne poit aver accion."

[6] Lane v. Cotton (1701) 1 Ld. Raym. 646; Mersey Docks Trustees v. Gibbs (1866) L.R. 1 H. of L. 93, 124 *per* Lord Wensleydale; Raleigh v. Goschen [1898] 1 Ch. 73; Bainbridge v. Postmaster-General [1906] 1 K.B. 178.

[7] For the modern history of this branch of the law see Bk. iv Pt. II. c. 6 § 1.

did not fulfil this duty was guilty of a "misprision" of treason or felony.[1] It was likewise the duty of every citizen, if called upon, to help to arrest a felon[2] or to serve on a jury; and criminal proceedings could be taken against those who neglected these duties, or against those who performed them badly.[3] There was a curious case in 1330 in which Edward III. took proceedings against the Bishop of Winchester for neglecting his duty by departing from the Parliament before it was ended.[4] It would seem that the king regarded such a neglect of duty as a species of contempt. And he sometimes used this procedure to enforce not only public duties, but also his private rights; for, as little distinction was drawn at this period between the king's capacities,[5] little distinction could be drawn between his various powers and rights. Thus in 1371 he took proceedings against the abbot of St. Oswald for disobedience to his command to assign a corrody to a certain person, which he asserted and the abbot denied was in his gift.[6]

In the thirteenth century the control of the courts over the misdeeds of subordinate courts and officials was strict. We have seen that a large part of the business of the Eyre consisted of an examination of the mode in which they had fulfilled their duties.[7] But the general Eyre ceased to be held, the local government of the country gradually passed for the most part into the hands of the justices of the peace,[8] and the law came to rely rather upon the action of the injured individual than upon the action of the central government.[9] In fact, as the old communal organization of the local government decayed, the direct control of the courts grew weaker. The offences for which these old communities of the land and their officials were punishable tended to become obsolete with the changes in the form of government involved in

[1] Staunford, P.C. i c. 39; Coke, Third Instit. 139. In earlier days, when the offence of treason was ill-defined, above 289-291, it would seem that the concealment of treason ranked as treason, Bracton f. 118b; Coke, Third Instit. 36, Hale, P.C. i 372; no doubt the definition of treason effected by Edward III.'s statute helped to differentiate treason from misprision of treason, though it was not clearly differentiated till later, Bk. iv Pt. II. c. 5 § 1; and in Coke's day an element of confusion had arisen in that the term "misprision" had got an extended meaning; to use Coke's words, it was not merely a *crimen omissionis*, consisting in the concealment of treason or felony, it was also *crimen commissionis*, "as in committing some heinous offence under the degree of felony;" in this latter sense it was a vague offence which covered many various contempts.

[2] Fitz., Ab. *Corone* pl. 395 (8 Ed. II.); the Eyre of Kent (S.S.) i 152-153; but persons under age and "not sworn to the law" were excused, the Eyre of Kent *loc. cit.*

[3] Fitz., Ab. *Corone* pl. 207—a juror arraigned for discovering the king's counsel; cp. ibid pl. 272.

[4] Ibid pl. 161=Y.B. 3 Ed. III. Pasch. pl. 32.

[5] Below 463-468.

[6] Y.B. 44 Ed. III. Trin. pl. 33.

[7] Vol. i 269-271.

[8] Ibid 285-292.

[9] Above 317-318.

the rise of the justices of the peace. The courts were hampered with much old learning relating to the older system. Not having as yet realized the new conditions, they had not yet established that firm control over the new authorities which the justices in eyre had been accustomed to exercise over the old authorities. Consequently the control of the common law over the local government of the country was never weaker than it was at the close of this period. It was not till the strong government of the Tudors had again accustomed the country to an active executive that the common law, either in alliance or in competition with the council, regained this control. The old learning was then made to supply precedents for the exercise of that control whenever the central government was strong or active enough to set the law in motion. The lawyers remembered some of these old precedents when they wished to amplify their jurisdiction in order to compete with rival courts. Thus Coke used the two cases of Adam de Ravensworth and John de Northampton to prove that libel was a common law offence.[1] The case of Adam de Ravensworth was probably a case of scandalum magnatum,[2] which, as we shall see, was specially provided for by statute.[3] John de Northampton was an attorney of the King's Bench who had written a letter which libelled the judges and clerks of the court;[4] and he was probably dealt with by the court by virtue of its power to punish contempts committed by its officers.[5] The cases obviously do not bear out the broad proposition for which they were cited. But Coke wished to show that the King's Bench had as wide a jurisdiction in cases of libel as the court of Star Chamber; and they were the only likely cases which he could find.[6]

One subject upon which the criminal law of this period was full and ample was the subject of offences against the machinery of justice. These fall under three main heads: Firstly, offences which are in the nature of a contempt of the court and its process; secondly, offences which aim at the perversion of the machinery of justice; and thirdly, offences which

[1] Third Instit. 174.

[2] "Adam de Ravensworth was indicted in the King's Bench for the making of a libel in writing, in the French tongue, against Richard of Snowshall, calling him therein Roy de Ravenors, etc.," ibid.

[3] Below 409.

[4] He wrote to John Ferrers, one of the king's Council, "that neither Sir William Scot, Chief Justice, nor his fellows the king's justices, nor their clerks, any great thing would do by the commandment of our Lord the King, nor of Queen Philip, in that place, more than of any other of the realm," Third Instit. 174.

[5] Below 392.

[6] "The mention as notable of these two cases which seem in no other way notable, looks as if they were the only cases of libel which Coke had met with in his study of the records," Stephen, H.C.L. ii 302.

originally fell under the last-mentioned head, but which were later generalized, and, as so generalized, added important chapters to the law of crime and tort. This classification is beginning to emerge in the sixteenth century. It is hardly apparent in the Middle Ages. But, if we look at some of the very miscellaneous and somewhat amorphous mediæval rules upon these topics, we can see the germs of the later classification. I shall therefore deal with these rules under these three heads; and under each head, I shall indicate the manner in which they developed in later law. We shall thus be able to perceive the origins of certain bodies of law, the development of which will be related in the succeeding Book of this History.

(1) *Offences which are in the nature of a contempt of the court and its process.*[1]

Disobedience to the king's writ was a contempt of the king; and from an early period the offender could be attached summarily.[2] When in prison he would be allowed after an interval to purge his contempt by making fine with the king. The fine thus settled between the judges and the offender was a "bilateral transaction—a bargain. It is not 'imposed,' it is 'made'."[3] This process of making fine with the king was being extensively used by the judges in Henry III.'s reign;[4] and it naturally superseded the older amercements imposed by the courts for many sundry irregularities committed by officers of the courts and others, which were affeered by the suitors of the court.[5]

This power to imprison and fine those guilty of contempt seems to have been originally used, firstly, to punish direct disobedience to the process of the court, and secondly, to punish all kinds of irregularities and misfeasances of officials of the court. That direct disobedience to the process of the court could be punished by attachment has never been doubted.[6] It would seem, for instance, that disobedience to a writ of

[1] The best historical account of this matter, on which my summary is mainly based, is to be found in two articles by Mr. C. J. Fox on "The King v. Almon," L.Q.R. xxiv 184, 266; and two articles by the same author on "Summary Process to Punish Contempt," L.Q.R. xxv 238, 354.

[2] L.Q.R. xxv 238; xxiv 194-195; it is pointed out, L.Q.R. xxv 252 n. *a*, that in the Prohibition upon the articles of the clergy, printed among the statutes of uncertain date, Statutes (R.C.) i 209, attachments vi laica are said to pertain to the crown; attachment was not granted as a civil process till the end of the seventeenth century, L.Q.R. xxv 252-253 n. *a*.

[3] P. and M. ii 516.

[4] Ibid.

[5] L.Q.R. xxv 240-242; see Y.B. 7 Hy. VI. Mich. pl. 17 *per* Cottesmore; Griesley's Case (1588) 8 Co. Rep. at f. 38b.

[6] Above n. 2.

prohibition was from the first punished by attachment;[1] and the power thus to attach those who disobeyed the king's commands was extended by statute—it was, for instance, given to sheriffs by a clause of the Statute of Westminster II.[2] Probably also the court had power from an early date to deal thus with its officers who were guilty of irregularities or contempts.[3] It is clear that this jurisdiction was well established in the fourteenth and fifteenth centuries. Thus, jurors were frequently fined for eating and drinking before giving their verdict. An undersheriff was attached because his servant allowed the jury to go at large. A juror who failed to appear could be amerced. An attorney guilty of sharp practice or other misconduct could be imprisoned.[4] Probably John of Northampton—an attorney of the King's Bench who, as we have seen,[5] was punished for writing a letter which was adjudged to be in scandalum Justiciæ et Curiæ—was thus dealt with because he was an officer of the court. And this power of dealing summarily with attornies and of striking them off the rolls was enlarged by a statute of 1403.[6]

In these two classes of cases, then, the courts could attach and summarily punish an offender by imprisoning him, and subsequently releasing him on payment of a fine. It would seem too, that, as early as Edward III.'s reign, they had power thus to deal with contempts committed by other persons in their actual presence;[7] and this, as Littleton and Selden explained in 1627,[8] could be justified by the theory that "the offence being done in the face of the court, the very view of the court is a conviction in law." But all through the mediæval period, and long afterwards, the courts, though they might attach persons who were guilty of contempts of court, could not punish them summarily. Unless they confessed their guilt, they must be regularly indicted and convicted. Mr. Fox has given a list of forty cases of various contempts—

[1] Bracton ff. 410, 411; cp. Y.B. 22 Ed. IV. Mich. pl. 9—attachment against the Ordinary of St. Albans for disobedience to a writ ordering him to absolve an excommunicate.

[2] 13 Edward I. st. 1 c. 39 § 23; Gilbert, C.J., in his history of the Common Pleas suggested that this statute was the origin of the power to commit, but this view was not taken by Wilmot, J., in The King v. Almon, nor by Blackstone, L.Q.R. xxiv 192-193.

[3] See Y.B. 3, 4 Ed. II. (S.S.) 195 where Stanton, J., thus addressed an attorney: "Because you to delay the woman from her dower have vouched and have not sued a writ to summon your warrantor, this Court awards that you go to prison."

[4] See the authorities cited by Mr. Fox, L.Q.R. xxv 245.

[5] Above 390.

[6] 4 Henry IV. c. 18.

[7] Y.B. 17 Ed. III. (R.S.) 276, cited L.Q.R. xxv 253 n. *f.*

[8] Stroud's Case (1629) 3 S.T. at p. 267.

insults to the judges, an assault on the attorney general, beating jurors, striking a witness, trampling on a writ of prohibition—in all of which the offender was tried by the ordinary course of law.[1] That this was the correct course to pursue was stated by Anderson, C.J., in 1599;[2] and in the famous case of the convicted prisoner who, at the Salisbury assizes in 1631, "Ject un brickbat a le dit justice que narrowly mist," an indictment was immediately drawn by Noy, and his hand was cut off and fixed to the gibbet on which he was immediately after hanged.[3]

Two connected developments mark the later history of this branch of the law. (i) The Council and later the Star Chamber had long possessed a jurisdiction over contempts committed against any court;[4] and the common law courts had from an early period sometimes referred such cases to them.[5] After the abolition of the Star Chamber and the jurisdiction of the Council in England in 1641 the King's Bench assumed this jurisdiction.[6] It was then able the more easily to do so because it could be represented as a supplement to and a corollary of its powers to correct "misdemeanours extra-judicial"[7] committed by or occurring in all inferior courts; and as a consequence of the fact that it had inherited from the Star Chamber the position of custos morum[8] of all the subjects of the realm. And these are the bases on which this jurisdiction is now rested.[9] (ii) Simultaneously with this development we can see the gradual enlargement of the powers of the court to convict and punish summarily without having recourse to an indictment and the verdict of a jury. This development was partly due to statutes which gave the courts in certain cases power to inflict punishment after examination without a trial by jury,[10] and partly—perhaps mainly—to the example of the Council and later of the Star Chamber. The Council and Star Chamber proceeded by the examination of

[1] L.Q.R. xxv 242-244.

[2] "A man may be imprisoned for a contempt done in court but not for a contempt out of court," Dean's Case (1599) Cro. Eliza at p. 690, cited L.Q.R. xxv 246; it may be noted that Hale laid it down, P.C. i 587, that "if an affray be made in the presence of a justice of peace . . . he may arrest him, and detain him ex officio till he can make a warrant and send him to gaol."

[3] Dyer 188b note.

[4] L.Q.R. xxiv 272-273; Hudson, Star Chamber 117.

[5] For the earlier cases see L.Q.R. xxv. 354-355; for later cases see L.Q.R. xxiv 272-273.

[6] L.Q.R. xxiv 273-274.

[7] Coke, Fourth Instit. 71; vol. i 212.

[8] Hawkins, P.C. Bk. ii. c. 3 § 4.

[9] R. v. Davies [1906] 1 K.B. 32; R. v. Daily Mail [1921] 2 K.B. 733.

[10] A long list of these statutes stretching from 5 Henry IV. c. 8 to 3 James I. c. 13 is given by Mr. Fox in L.Q.R. xxv 358-362.

the accused and without a jury. And, as the relations between the common law judges and the Star Chamber were intimate, it is not improbable that the procedure of the latter court had some influence on the evolution of the common law doctrine on these matters.[1] Thus, even at the beginning of the seventeenth century, the judges were taking upon themselves to punish summarily offences which in the Middle Ages would have been remedied by an indictment[2] or a bill of deceit.[3] It is not, however, till after the abolition of the Star Chamber in 1641 that the great expansion of their jurisdiction to deal summarily with all manner of contempts takes place. In the middle of the seventeenth century they were exercising this jurisdiction in the case of contempts committed out of court.[4] Occasionally indeed earlier sixteenth and seventeenth precedents were followed, and a procedure by way of information and trial by jury was used;[5] but informations were often abused in many ways, and they were unpopular; "and so the summary process slipped in and the supposed delinquents were deprived of the privilege of having their cases tried by the verdict of even one jury."[6] This jurisdiction reached its furthest limit when it was laid down in Wilmot, J.'s, undelivered judgment in *The King v. Almon* (1765) that a libel on the court, or a judge in his judicial capacity, could be punished summarily by attachment—a decision for which there was little if any authority.[7] But, in spite of this fact, it was accepted as correct, and it forms the basis of the modern law on this subject.[8]

(2) *Offences which aim at the perversion of the machinery of justice.*

In a relatively primitive society private war is the natural and most congenial remedy of those who are or think they are

[1] As Mr. Fox says, L.Q.R. xxv 356, "When it is remembered that some of the judges were members of this committee (the Star Chamber), it will be seen that there was an intimate connexion between the common law courts and the Star Chamber, and that the procedure of the latter court might be gradually introduced into the practice of the common law courts. It is certain that the old procedure by bill for contempt followed by attachment, whereby the defendant was brought in to have the question tried by a jury, was in course of time transformed into an attachment followed by an examination of the accused by interrogatories, whereby he might be acquitted or convicted by the court."

[2] In Bruistone v. Baker (1616) 1 Rolle 315 Coke, C.J., clearly thought that he had the power (though he refused to exercise it in the case before him) of punishing summarily a person who had treated the process of the court with contempt; see L.Q.R. xxv 249.

[3] Lord v. Thornton (1614) 2 Bulstr. 67—a person aged sixty-three who pleaded infancy to delay the proceedings was attached.

[4] L.Q.R. xxv 366, and references to Style's Practical Register there cited; for earlier cases of Charles I.'s reign see ibid 369.

[5] Ibid 368.

[6] Ibid 369.

[7] Ibid xxiv 184 seqq.; 266 seqq.; the judgment is reported in Wilmot's Notes 243.

[8] See the modern cases cited, L.Q.R. xxv 238-240.

wronged; and, when the strength of the law makes a recourse to this expedient dangerous or impossible, when those who are wronged are compelled to have recourse to the law, much of the unscrupulousness and trickery which accompany the waging of a war are transferred to the conduct of litigation. The courts are beseiged with angry litigants who fight their lawsuits in the same spirit as they would have fought their private or family feuds. This, as we have seen, is a phenomenon which recurs in many nations at many periods:[1] but it was specially apparent in mediæval England. The victory won by royal justice in the thirteenth century was somewhat premature. The legal and political ideas held by the royal judges were too far in advance of a society which was still permeated by feudal ideas of a retrograde type.[2] And so, contemporaneously with the growth of the power of the royal courts, we get the growth of many various attempts to pervert their machinery; and, when the royal power weakened, these attempts were so frequently and successfully made that the law was subverted and civil war ensued.[3]

But naturally the struggle of the courts with these forms of lawlessness produced the growth of a body of law, both enacted and unenacted, which defined and distinguished many various offences. Both the statutes and the Year Books show that, by the end of the mediæval period, it had grown to a large bulk. Such offences as rescous, escape, and prison breach were largely illustrated in the books.[4] But more interesting than these are certain offences which were more directly designed to pervert the machinery of justice. These are the offences of forgery, perjury, conspiracy, deceit, champerty, maintenance, and embracery. Of the first four of these I shall speak under the following head, as they all became generalized, and developed into offences which had nothing to do with the perversion of the machinery of justice. At this point I must say something of the history of the last three of these offences.

It would seem that the earliest of these offences to become differentiated was champerty.[5] Neither Glanvil nor Bracton have anything to say of maintenance.[6] But Bracton mentions what afterwards came to be known as champerty, that is the maintenance or support of a suit in consideration of a share of the proceeds. This it would seem was a criminal offence when Bracton wrote, as it was included among the articles of the

[1] Vol. i 506 and n. 6. [2] Vol. ii 415-418. [3] Ibid.
[4] Staunford, P.C. i cc. 25-33; Hale, P.C. i caps. lii, liii, liv.
[5] On this subject generally see Winfield, Hist. of Conspiracy chap. vi, the substance of which is also printed in L.Q.R. xxxv 50.
[6] Hist. of Conspiracy 140.

Eyre;[1] but it is very doubtful whether at that time mere maintenance of a suit on behalf of another was unlawful. It is true that Coke and subsequent authorities held that it was a common law offence.[2] But there is no clear evidence for this proposition; and for two reasons it is difficult to suppose that much evidence can be forthcoming on this point. In the first place, whether it was a common law offence or not, it was made an offence by a series of statutes of Edward I.'s reign. In the second place, there is no reason to think that the term maintenance became the technical name for this particular offence till the passing of these statutes.[3] Even after this date it was often used in the untechnical sense of supporting or upholding. A litigant will maintain his writ; the king will maintain his jurisdiction.[4]

It was only a few years after Bracton wrote that the legislature discovered that the maintenance of another's action might lead to the perversion of justice, even though there was no agreement that the maintainer should share the profits.[5] With this discovery begins the history of maintenance as a criminal and a civil offence. Naturally many of the statutes dealt also with champerty; and it is mainly the treatment of these two offences by the legislature, and the litigation to which they gave rise, which have emphasized the fact that they are offences of the same nature, and have given rise to the modern definition of champerty as an aggravated form of maintenance.[6]

The first of these statutes is the Statute of Westminster I.[7] Chapter 25 made champerty committed by a royal officer a criminal offence.[8] Chapter 28 inter alia made it a criminal offence for clerks of justices or sheriffs to maintain suits depending in the king's courts. Chapter 33 attempted to suppress maintenance in the local courts—an offence which had been facilitated by the

[1] "De excessibus vicecomitum et aliorum ballivorum, si aliquam litem suscitaverint occasione habendi terras vel custodias, vel perquirendi denarios, vel alios profectus, vel per quod justitia et veritas occultetur, vel dilationem capiat," f. 117a.

[2] Coke, Second Instit. 212; Hawkins, P.C. Bk. i cap. 83 § 35; for other authorities which have taken the same view see Hist. of Conspiracy 139.

[3] Ibid 140-141.

[4] Ibid 134, and references there cited.

[5] "We have long been told that champerty is a species of maintenance. This is true now, but historically it looks very much like an inversion of genus and species. . . . Before Edward I.'s time, maintenance was used in its purely popular sense of support. Merely to maintain or support the suit of another was probably not a substantive wrong at all. But it was wrongful if the support were for the purpose of sharing the proceeds of the suit," Hist. of Conspiracy 140.

[6] Thus Coke says, Second Instit. 208, "An action of maintenance did lie at the common law, and if maintenance *in genere* was against the common law, *a fortiori* Champerty, for that of all maintenances is the worst;" and cf. Co. Litt. 368b.

[7] 3 Edward I.

[8] The reason why royal officials are specially signalled out is the growing and widespread corruption amongst them, which is well illustrated by the political songs of the period, see vol. ii 294.

general permission given by the Statute of Merton to appoint attornies to sue in those courts.[1] The Statute of Westminster II. cap. 49[2] for the first time mentioned champerty eo nomine. It forbade the royal officials from the Chancellor downwards to commit this offence.[3] The ordinance against conspirators of 21 Edward I. seems to be directed against those guilty of both maintenance and champerty as well as against those guilty of conspiracy;[4] and it perhaps applied to all persons guilty of maintenance and champerty, and not only to royal officials.[5] However that may be, it is clear that in the Articuli super Cartas of 1300 there is a general prohibition against champerty,[6] and anyone was allowed to sue for the penalty on behalf of the king.[7] But champerty as a term of art was new. It therefore needed definition; and a definition was supplied in the Statutum de Conspiratoribus, which defined conspiracy.[8] The two offences were then intimately allied—indeed, as Dr. Winfield points out, it was at that date hardly possible to distinguish clearly the three offences of champerty, maintenance, and conspiracy.[9] It should be noted that none of these statutes gave a purely civil remedy; and the absence of any civil remedy is borne out by what authority there is in the Year Books.[10]

In Edward III.'s reign the prohibitions of both maintenance and champerty were multiplied. In 1331 a civil as well as a criminal remedy was for the first time given;[11] and there is no

[1] Vol. ii 316.

[2] 13 Edward I. st. 1.

[3] "The Chancellor, Treasurer, Justices, nor any of the king's counsel, nor clerk of the Chancery, nor of the Exchequer, nor of any justice or other officer, nor any of the king's house clerk or lay, shall not receive any church nor advowson of a church, land, nor tenement in fee by gift nor by purchase, nor to farm, nor by champerty, nor otherwise, so long as the thing is in plea before us or before any of our officers."

[4] R.P. i 96 cited below 402 n. 3; Statutes (R.C.) i 216; for the writ authorized by the Statute see below 404 n. 1.

[5] Its words seem to warrant this construction; but Dr. Winfield points out, Hist. of Conspiracy 147 n. 1, that the framers of 28 Edward I. c. 11 thought that they were making the first general statute on the subject; the statute is said to be made "because the king hath heretofore ordained by statute that none of his ministers shall take no plea for champerty, by which statute others besides his ministers are not before this time bound."

[6] 28 Edward I. st. 3 c. 11.

[7] See Y.BB. 4 Ed. II. (S.S.) 141-143; 11, 12 Ed. III. (R.S.) 538-542, 634-637.

[8] "Campi participes sunt qui per se vel per alios placita movent vel movere faciant; et ea suis sumptibus prosequuntur, ad campi partem, vel pro parte lucri habenda," 33 Edward I. st. 2; below 403; those who habitually committed these and the like offences were said to be guilty of barratry, see the Case of Barratry (1588) 8 Co. Rep. 36b.

[9] "Conspirators were roughly speaking those who combined to abuse legal procedure. But what less could be said of champertors and maintainers," History of Conspiracy 146; see the Eyre of Kent (S.S.) i 145, for a case of a conspiracy to maintain.

[10] Hist. of Conspiracy 150, and see the Y.BB. of 6 Ed. III. and 14 Ed. II. cited at pp. 148-149.

[11] 4 Edward III. c. 11.

doubt that such an action was recognized in the latter part of the mediæval period.[1] In 1347 there is another comprehensive statute;[2] and Richard II.'s reign opens with another statute of a similar character.[3] We have seen that during the remainder of the mediæval period statutes directed against these and cognate offences were multiplied;[4] but that they were all ineffective to cure the evil by reason of the "want of goverance" from which the country was suffering.[5] But, though they were unable to effect the purpose for which they were passed, they did result in defining with a certain amount of precision the two offences of maintenance and champerty.

Coke defined maintenance as "an unlawful upholding of the demandant or plaintiff, tenant, or defendant in a cause depending in suit, by word, action, writing, countenance, or deed;"[6] and in Dr. Winfield's opinion this fairly represents the Year Book authority.[7] Similarly we have seen that Coke defines champerty as being simply an aggravated variety of maintenance; and that, as a result of this mediæval legislation, this is what it had in substance become.[8] There was a good deal of authority on the question of what was "unlawful" upholding. We have seen that the courts were inclined to define very many kinds of "upholding" as unlawful—the giving of unsolicited testimony[9] and even standing with a stranger at the bar.[10] But it had been recognized in the Articuli super Cartas that a man might have the counsel of his legal advisers or his relations or neighbours;[11] and the cases make it clear that blood relationship, or the relation of master and servant, or even charity, made it lawful to maintain.[12]

We shall see that these mediæval rules as to maintenance and champerty are the foundation of our modern law.[13] But by no means all the mediæval rules have survived till modern times. The multiplicity of the mediæval statutes and cases had given rise to numerous distinctions which are now obsolete. Coke tells us of the distinction between manutenentia ruralis and curialis,[14]

[1] Hist. of Conspiracy 153-154 and the Y.BB. there cited.
[2] 20 Edward III. cc. 4, 5, 6.
[3] 1 Richard II. c. 4.
[4] Vol. ii 452; see Hist. of Conspiracy 151-152.
[5] Vol. ii 414-416; see Hist. of Conspiracy 154-157.
[6] Second Instit. 212.
[7] Hist. of Conspiracy 136.
[8] Above 396 n. 6.
[9] Y.B. 22 Hy. VI. Mich. pl. 7 (p. 5) *per* Paston, J.; see vol. i 334-335.
[10] Y.B. 22 Hy. VI. Mich. pl. 7 (p. 6) *per* Newton, J.; cp. Y.B. 21 Hy. VI. Mich. pl. 30 (p. 15) *per* Paston, J.
[11] 28 Edward I. st. 3 c. 11; vol. ii 315 n. 1.
[12] Y.B. 21 Hy. VI. Mich. pl. 30 (p. 16).
[13] Bk. iv Pt. II. c. 5 § 3.
[14] Co. Litt. 368b; manutenentia curialis is what we understand by maintenance; manutenentia ruralis is "to stir up and maintain quarrels, that is complaints, suits, and parts in the country, other than their own, though the same depend not in plea," Second Instit. 213; Hist. of Conspiracy 131-134; as Dr. Winfield points out, it was probably never a distinction of very much importance.

and the distinction between general and special maintenance.[1] But the latter distinction was chiefly or only a pleading distinction; and it is doubtful if manutenentia ruralis still exists.

Coke also classified embracery as a subdivision of manutenentia curialis. "When one laboureth the jury if it be but to appeare, or if he instruct them, or put them in feare, or the like, he is a maintainer, and is in law called an embraceor, and an action of maintenance lyeth against him."[2] No doubt the offences of embracery and maintenance are similar in their nature; but they are clearly distinct,[3] and are distinguished in certain dicta in the Year Books.[4] They are not identified by Fitzherbert,[5] and the statute law relating to them is different. Statutes of 1332[6] and 1361[7] had made it a criminal offence in a juror to receive a bribe, and had allowed anyone to sue for the penalty provided for this offence. In 1365[8] a penalty of ten times the amount taken was imposed both on a juror who took a bribe and on an embraceor who actually took money to labour or procure a jury—a penalty enforced by the writ of decies tantum.[9] But it was clear that a person "who had come to the bar and talked in the cause, or who had stood there to survey the jury or put them in fear,"[10] had done an act very similar to and hardly distinguishable from an act of maintenance. Naturally therefore the courts tended to regard such acts as acts of maintenance;[11] and the analogy was strengthened by the fact that relationships which would afford a defence to proceedings for maintenance were also a defence to certain acts which might

[1] As to this see Hist. of Conspiracy 136-138; the most intelligible account of it seems to me to be given by Paston, J., in Y.B. 21 Hy. VI. Mich. pl. 30 (p. 15) where he says that it is a good justification to say that the maintainer is of kin to the person maintained, "auterment (si) ceux que sont lais gens voillent prendre ceo pur un maintenance, issint coarcterait l'autre de monstrer special maintenance;" by which I understand him to mean that a verdict against the defendant who had pleaded such a plea could only be supported by proof of special facts—just as at the present day a plea of privilege can be rebutted by proving express malice; but as Dr. Winfield points out the cases are conflicting; in Y.B. 22 Hy. VI. Mich. pl. 7 (p. 6) Newton, J., seems to regard it as an act which needs to be specially defined in the declaration—like an innuendo in the case of a libel which is not at first sight defamatory.

[2] Co. Litt. 369a.

[3] Hist. of Conspiracy 135-136.

[4] Y.BB. 13 Hy. IV. Hil. pl. 12 *per* Hankford, J.; 11 Hy. VI. Mich. pl. 24 *per* Martin, J., cited Hist. of Conspiracy 136 n. 1.

[5] F.N.B. 171 B. thus defines an Embraceor: "An Embraceor is he who cometh to the bar with the party and talketh in the cause, or standeth there to survey the jury, or to put them in fear; but the lawyers may plead in the cause for their fees, but they cannot labour the jury, and if they take money so to do they are embraceors."

[6] Edward III. c. 10.

[7] 34 Edward III. c. 8.

[8] 38 Edward III. c. 12.

[9] "*Decies Tantum* lieth against an embraceor if he take money, as well as against a juror, otherwise not," F.N.B. 171 A.

[10] Above n. 5.

[11] Y.B. 22 Hy. VI. Mich. pl. 7 (p. 6) *per* Newton, J.

otherwise have amounted to embracery.[1] The legislature also took the view that the two offences were substantially similar when it penalized them in the same way in 1541.[2] Probably therefore Coke did not materially misrepresent the actual state of the law in his day when he classified embracery as a species of maintenance.[3] This was in fact the result of the way in which this branch of the law had been developing during the fifteenth and sixteenth centuries. When this identification had been established it became possible to contend that acts of embracery were, equally with acts of maintenance, offences at common law.[4] But obviously for this proposition there was even less authority than for the proposition that maintenance was a common law offence.[5] No doubt from an early period violence to jurors could be punished by indictment as a contempt of court;[6] but, till the passing of the statutes of 1361 and 1365, and the identification of embracery with maintenance, it is difficult to find any authority for the punishment of those who attempted to influence them unduly.

(3) *The offences designed to pervert the machinery of justice which were generalized in later law.*

Under this head come, as I have said, the offences of forgery, perjury, conspiracy, and deceit. All these offences were originally simply offences against the machinery of justice. The offence of forgery had been known to the common law from an early period; but, apart from forgery of the king's seal or money, which was treason, the only forgery punishable at the common law was "the reliance upon a forged document in a court of law."[7] In the case of perjury the only form of it punishable by the common law was the perjury of jurors.[8] Other forms of perjury were matters for the ecclesiastical courts. "A miserable jealousy blunted the edges of those two swords of which men were always speaking; neither power would allow the other to do anything effectual. . . . And so our ancestors perjured themselves with impunity."[9] Since Edward I.'s reign, if not earlier, the law had known the offence of conspiracy; but the only conspiracy which it punished was a conspiracy to take civil

[1] Y.B. 21 Hy. VI. Mich pl. 30 (p. 16) *per* Newton and Paston, J.J.; cp. Hussey v. Cooke (1621) Hob. 294; Hawkins, P.C. Bk. i c. 85 § 6.
[2] 32 Henry VIII. c. 9 § 3.
[3] Co. Litt. 369a.
[4] Hawkins, P.C. Bk. i c. 85 § 7.
[5] Above 395-396.
[6] Above 393.
[7] P. and M. ii 539; for a good instance see Y.B. 21, 22 Ed. I. (R.S.) 388. Apparently in the twelfth century it was treated as a felony, Assize of Northampton c. i; and cp. Y.B. 18, 19 Ed. III. (R.S.) 76, 78; 1 Henry V. c. 3 gave a civil remedy.
[8] Vol. i 337-338, 339-340.
[9] P. and M. ii 541.

or criminal proceedings maliciously.[1] Similarly the law possessed a writ of deceit; but originally it lay only for some deceit committed in the course of legal proceedings.[2] In the future the law will be developed by generalizing all these offences. In all these cases this development will be assisted and in some cases initiated by the practice of the Council and the Star Chamber;[3] and in the case of forgery and perjury it will be assisted by the legislature.[4]

But, though this development is mainly the work of the sixteenth and early seventeenth centuries, it was already beginning in the mediæval period in the cases of conspiracy and deceit. Of the origins and mediæval development of these two offences, therefore, it will be necessary to speak at this point.

Conspiracy.

Both Bracton[5] and Britton[6] mention conspiracies or confederacies among the pleas of the crown which should be presented by the jury of presentment. Bracton would seem to equate those who conspired to commit crimes with accessories to crimes.[7] Britton would seem to confine the term to conspiracies to hinder justice;[8] and in 1279 Edward I. had issued letters close to the justices in Eyre ordering them to enquire into such conspiracies—a step which led to the inclusion in the Articles of the Eyre of the Article "de mutuis sacramentis."[9] But it is not till certain statutes of Edward I.'s reign gave a writ of conspiracy that the offence definitely emerged. Though some writers have thought that such a writ existed at common law,[10] Dr. Winfield's examination of the MSS. Registers of writs would seem to make it very much more probable that it owes its origin to these statutes.[11] In fact, it may well be that the need for more stringent

[1] Below 402-404.
[2] Vol. ii 366; below 407.
[3] Bk. iv Pt. I. c. 4.
[4] Ibid c. 2.
[5] f. 128.
[6] i 95.

[7] "Ubi principale non consistit, nec ea quae sequuntur locum habere debent, sicut dici poterit de precepto, conspiratione, et consimilibus quamvis hujusmodi esse possunt etiam sine facto, et quandoque puniuntur si factum subsequatur, sed sine facto non, juxta illud: quid enim obfuit conatus, cum injuria nullum habuit effectum. Nec enim obesse debent preceptum, conspiratio, preceptum et consilium, nisi factum subsequatur," f. 128.

[8] "Let it also be enquired concerning confederacies between the jurors and any of our officers, or between one neighbour and another, to the hindrance of justice; and what persons of the county procure themselves to be put upon inquests and juries, and who are ready to perjure themselves for hire, or through fear of anyone: and let such persons be ransomed at our pleasure, and their oath never after be admissible," i 95.

[9] H. E. Cam, Vinogradoff, Oxford Studies vi, xi 58-59.

[10] Staunford, Pleas of the Crown 172a; Coke, Second Instit. 562; Y.B. 11 Hy. VII. Trin. pl. 7 *per* Fairfax, J.; Smith v. Cranshaw (1625) W. Jones 93.

[11] Hist. of Conspiracy 29-37.

measures was, as Miss Cam suggests, caused by the attempts of guilty persons to evade the enquiries made by the government in the general Eyre and otherwise.[1] We must therefore regard these statutes and the writ given by them as the starting point of the modern law on this subject. But, as with many another of these old writs, so with the writ of conspiracy, there was a tendency in the fourteenth and fifteenth centuries to supplement, and almost to supersede it by an analogous action on the case. The rise and spread of this action introduced a new element into the offence of conspiracy, which has had a large influence on the common law on this subject, and has modified both directly and indirectly the law which has grown up round the writ of conspiracy. Therefore in dealing with the common law on this subject I shall deal firstly with Edward I.'s statutes; secondly, with the writ of conspiracy and its development; and thirdly, with the action on the case in the nature of a conspiracy.

(i) Edward I.'s Statutes.

There are three of these statutes.[2] The first is the so-called Statute of Conspirators, which probably comes from the year 1293.[3] It enacted that a writ[4] should be provided for those who wished to complain of conspirators, and of those guilty of maintenance or champerty; and that those found guilty of these offences should be punished by imprisonment and ransom. The second of these statutes is a clause in the Articuli super Cartas of 1300. It provided that, "in respect of conspirators, false informers, and evil procurers of dozens, assizes, inquests, and juries, the king has ordained a remedy by writ of the Chancery;" and it gave power to the judges of either bench and judges of assize to try by a jury, without writ, complaints made of such offences.[5] These statutes had spoken of conspirators without giving any

[1] H. E. Cam, Vinogradoff, Oxford Studies vi, xi 59.

[2] For the statute of 13 Edward I. st. 1 c. 12 for the punishment of those who brought or abetted false appeals, and the subsequent application of the writ of conspiracy to this case see Hist. of Conspiracy 39-51. The statute does not make this offence conspiracy, though the two offences were closely allied.

[3] R.P. i 96, "De illis qui conqueri voluerint de Conspiratoribus, in patria placita malitiose moveri procurantibus, ut contumelie braciatoribus placita illa et contumelias ut campi partem vel aliquod aliud commodum inde habeant maliciose manutenentibus et sustinentibus, veniant de cetero coram justitiariis ad placita Domini Regis assignatis, et ibi inveniant securitatem de querela sua prosequenda. Et mandetur Vicecomiti per breve capitalis justitiarii et sub sigillo suo, quod attachientur quod sint coram Rege ad certum diem: et fiat ibi celeris justitia. Et illi qui de hoc convicti fuerint puniantur graviter, juxta discretionem Justiciariorum predictorum, per prisonam et redemptionem: Aut expectent tales querentes Iter justitiariorum in partibus suis si voluerint, et ibidem sequantur etc.;" for what is perhaps another version, see Statutes of Uncertain Date, Statutes (R.C.) i 216.

[4] For a discussion as to whether this writ was original or judicial see Hist. of Conspiracy 37-39.

[5] 28 Edward I. st. 3 c. 10.

definition of the term; and as can be seen from some of the writs in the MSS. Registers,[1] the offence of conspiracy badly wanted definition. At all times this offence has been apt to shade off into the particular wrong which the conspirators have combined to commit. It is therefore not surprising to find that, in the thirteenth century, plaintiffs purchased writs of conspiracy when their cause of action was rather deceit or some other specific wrong.[2] As Dr. Winfield has pointed out, many writs were very "fluid" before "the phrases in them had crystallized as terms of art."[3] It was with a view of helping litigants to ascertain whether their cause of action was properly redressible by a writ of conspiracy[4] that in 1304 the legislature passed the third of these statutes on the subject.[5] It runs as follows:— "Conspirators be they that do confeder or bind themselves by oath covenant or other alliance that every of them shall aid and support the enterprise of each other falsely and maliciously to indict, or cause to be indicted, or falsely to acquit people, or falsely to move or maintain pleas; and also such as cause children within age to appeal men of felony, whereby they are imprisoned and sore grieved; and such as retain men in the country with liveries and fees for to maintain their malicious enterprises and to suppress the truth; and this extendeth as well to the takers as to the givers. And stewards and bailiffs of great lords, which by their seignory office or power undertake to bear or maintain quarrels, pleas, or debates for other matters than such as touch the estate of their lords or themselves." The definition thus covered a wide ground; but most of the cases brought under the writ of conspiracy were cases of conspiracy to indict or appeal others for criminal offences. There are a few cases of conspiracy to take civil proceedings; but there are none of the other cases mentioned in the statute.[6] We

[1] Hist. of Conspiracy 31-33; as Dr. Winfield says, "The absence of any definition of conspiracy before 33 Edward I. would justify experiments with the writ."

[2] Ibid 32; thus in Y.B. 3 Ed. II. (S.S.) 196 Scrope argued that in that case the proper remedy was deceit; and this argument, as Dr. Winfield points out, prevailed at a later date, Hist. of Conspiracy 32.

[3] Ibid 33.

[4] "The Statute of Westminster II. gives a writ in a general way for a plea of conspiracy, etc. But the king being advised that this Statute was too general ordained another which names other cases of conspiracy," Y.B. 3 Ed. II. (S.S.) 194 *per* Bereford, C.J.

[5] 33 Edward I. st. 2.

[6] Hist. of Conspiracy 51-52; Dr. Winfield points out that the Y.BB., and Fitzherbert's and Brooke's Abridgments give fifty-two cases; of these thirty-five were cases of conspiracy to indict or appeal of criminal offences, eight were cases of abuse of civil procedure, one was not a case of abuse of procedure, and there are eight in which the nature of the conspiracy is not stated; in the Register of Writs "eight out of the nine writs are against those who have procured false appeals or indictments."

shall now see that these limitations on the use made by litigants of the writ of conspiracy had a considerable effect upon its development.

(ii) The writ of Conspiracy and its development.

The writ given by the statute of 1293[1] contemplates one defendant only, and summons him to answer for the plaintiff's plea of conspiracy and trespass. Later forms of the writ set out the conspiracy alleged, and always suppose at least two defendants.[2] In fact the forms of the writ grew more precise with the growing precision in the definition of the offence remedied by the writ. It is the development of this definition of the offence which I must here briefly trace.

The writ of conspiracy resembles many other writs of the thirteenth century in that it is by no means clear whether the remedy contemplated by it was criminal or civil.[3] In fact, like the writ of trespass, the remedy given by it was both of a criminal and civil nature;[4] and so in later law a plaintiff could either indict the defendants,[5] or sue them for damages.[6] Just as the writ of trespass is the parent both of the misdemeanour and of the tort, so the writ of conspiracy could, at the option of the injured party, be used as either a criminal or a civil remedy.

But the cases in which this remedy was available came gradually to be limited in the following ways:—

Firstly, the writ came to lie exclusively for a conspiracy to indict or appeal a man of felony. It is pretty clear from the definition given in the statute of 1304,[7] and from a case of the year 1310[8] that its scope had once been very much wider. In that case the court held that it lay for a conspiracy to procure an infant to make a statute merchant, in order to use it to get his

[1] "Rex Vicicomiti Salutem. Precipimus tibi quod si A. de B. fecerit te securum de clamore suo prosequendo, tunc pone per vadia et salvos pledgios G. de C. quod sit coram nobis a die Sancti Trinitatis in XV dies, ubicumque tunc fuerimus in Anglia ad respondendum prefato A de placito conspirationis et transgressionis secundum ordinacionem nostram nuper inde provisam, sicut idem rationabiliter monstrare poterit quod ei inde respondere debeat. Et habeas ibi nomina pledgiorum et hoc breve. Teste G. de Thornton," Statutes (R.C.) i 216.

[2] See the writ from Reg. Brev. f. 134, cited Hist. of Conspiracy 37-38.

[3] Vol. ii 365, 460.

[4] Ibid 365.

[5] Y.B. 11 Hy. VII. Trin. pl. 7 *per* Fairfax; cp. Skinner v. Gunton (1669) Wms. Saunders at p. 230; the judgment if this course was pursued was the same as that on a writ of attaint (see vol. i. 341), 27 Ass. pl. 59; 43 Ass. pl. 11; we may perhaps see it in germ in Britton i 95.

[6] Y.BB. 24 Ed. III Mich. pl. 35; 43 Ed. III. Mich. pl. 41; 8 Henry VI. c. 10 § 4 gave in certain cases both the criminal and the civil remedy, see Y.B. 11 Hy. VII. Trin. pl. 7.

[7] Above 403.

[8] Y.B. 3 Ed. II. (S.S.) 193-198.

land by fraud when he came of age.[1] In Edward III.'s[2] and Henry IV.'s[3] reigns it was held that it lay for a conspiracy to indict for trespass; and there is a precedent of a writ for a conspiracy of this kind in the Register.[4] But, towards the end of the fifteenth century, the judges were coming to the conclusion that it lay only for a conspiracy to indict or appeal for felony.[5] It was not till the seventeenth century that the question arose whether a conspiracy to indict a man for treason was actionable; and then it arose in relation, not to the writ of conspiracy, but to the action on the case for a conspiracy.[6] Secondly, the conditions under which a person indicted or appealed for felony could bring the writ were precisely defined. Thus, "nothing else than a technical acquittal by verdict would support the action. If the plaintiff had gone free by reason of a defective indictment, a charter of pardon, or benefit of clergy, he had no standing in court;"[7] and the law as to the circumstances under which a person appealed for felony could sue were very intricate.[8] Thirdly, although the plaintiff could either indict the defendant for conspiracy or sue him for damages, the gist of the proceedings was not the damage which he had suffered, but the act of conspiring. It followed therefore that the proceedings could not be taken against one defendant.[9]

Since the writ of conspiracy had been thus fenced about with limitations which seriously diminished its efficiency, it is not surprising that here, as in other cases, it was necessary to give a wider remedy by means of an action on the case in the nature of conspiracy.

(iii) The action on the case in the nature of conspiracy.

It is clear that the statutes of Edward I.'s reign contemplated a very much wider remedy than that given by the writ of conspiracy

[1] Y.B. 3 Ed. II. (S.S.) 193-194 Ruston argued that the writ only lay in two cases "namely where a man sues a plea to have champerty of the land, and where there is imprisonment on a false indictment;" but Bereford, C.J., did not give much encouragement to his argument.

[2] "Un Bill de Conspiracy fuit maintenu en Bank le Roy par agarde pur celuy que fuit endite de common trespass et acquitte, *non obstant que ce ne fuit mis felonie*," 3 Ass. pl. 13.

[3] Y.B. 7 Hy. IV. Mich. pl. 15.

[4] f. 134; and this, says Dr. Winfield, is paralleled in several MSS. Registers, Hist. of Conspiracy 54.

[5] Y.B. 31 Hy. VI. Trin. pl. 6 *per* Prisot, C.J.; F.N.B. 116 A-H; the remark cited from 3 Ass. pl. 13 above n. 2 would seem to show that even in Edward III.'s reign opinion was tending in this direction.

[6] Hist. of Conspiracy 58-59; see Bk. iv Pt. II. c. 5 § 3.

[7] J. W. Bryan, the Development of the English Law of Conspiracy (Johns Hopkins University Studies) 23; cp. F.N.B. 115 E-G; Y.B. 42 Ed. III. Pasch. pl. 27 *per* Kirton *arg*.

[8] Hist. of Conspiracy 39-51.

[9] Y.B. 24 Ed. III. Mich. pl. 34; F.N.B. 114 D, 116 L; see Winfield, Hist. of Conspiracy 59 seqq.; Present Law of Abuse of Legal Procedure 158-159.

as defined and limited by the law of the fifteenth century. Under these circumstances it was not difficult to apply the action on the case to conspiracies which did not fall under the statutory writ. From Edward III.'s reign onwards there are a large number of these actions.[1] Possibly, at a time when the limitations on the writ of conspiracy were not yet precisely ascertained, some of them may have been considered to fall under the statutory writ.[2] But Fitzherbert, writing at a time when these limitations had been ascertained, has no difficulty in classing them as actions on the case. It is clear that here as in other branches of the law this action was exerting a liberalizing influence. As in the earlier period before the offence had been rigidly defined,[3] there is at least one case in which the conspiracy alleged has apparently nothing to do with the taking of legal proceedings against the plaintiff.[4] But generally the cause of action alleged a conspiracy to defraud the plaintiff by the fraudulent use of the machinery of the courts. No doubt in allowing these actions the judges were influenced not only by the wide definitions of the earlier statutes,[5] but also by their willingness to suppress those abuses of legal process which were the most crying evil of the time.[6] In one case indeed of Richard II.'s reign[7] they held (contrary to Bracton's opinion,[8] and contrary to the prevailing theory of liability at common law)[9] that an action would lie, though nothing had been done in furtherance of the conspiracy.[10]

Thus it is quite clear that the scope of the offence was being very much extended by the application to it of the action on the case. And not only was its scope being thus extended by the action on the case, but its nature was becoming somewhat altered by reason of a difference in the character of the conditions needed to support such an action. The gist of all actions on the case was the damage suffered by the plaintiff. Hence the cause of action was not, as in the proceedings under the writ of conspiracy, the act of conspiring,[11] but the resulting damage. It followed that

[1] F.N.B. 116 A-H; Hist. of Conspiracy 55-58.

[2] Above 404-405; see Y.BB. 8 Ed. III. Hil. pl. 50; 42 Ed. III. Pasch. pl. 27.

[3] Above 403.

[4] Y.B. 40 Ed. III. Pasch. pl. 10 cited Hist. of Conspiracy 57; for another case see a writ cited from a MS. Register of the fourteenth century, ibid 37; for other cases from the Parliament Rolls and other sources see ibid 110-112.

[5] Thus in Y.B. 11 Hy. VII. Trin. pl. 7 Fairfax seems to think that while at common law "on n'aura Conspiracy forsque sur Enditement de felony," under the Statutes "il aura in trespass."

[6] Vol. ii 457-459; above 395.

[7] Bellewe f. 80.

[8] Above 401 n. 7.

[9] Above 373, 375; cp. preamble to 3 Henry VII. c. 14.

[10] This case reported by Bellewe should probably be connected with the view held by some of the judges at this period that the intent without the act was punishable, above 373 n. 4.

[11] Above 405.

an action on the case differed from proceedings taken under the writ of conspiracy in that it was possible to sue one conspirator alone without joining the others.[1]

It is possible that if the offence of conspiracy had been developed by the common law alone, the old writ of conspiracy would have become obsolete, and the offence would have become a tort pure and simple redressible by an action for damages. As I have already pointed out, there was a tendency during the latter part of the mediæval period for the miscellaneous wrongs redressible by the writ of trespass to drop their criminal character, and become torts.[2] But we shall see that in the sixteenth century the court of Star Chamber took a hand in the development of this offence; and that its action introduced a very different order of ideas as to its nature,[3] which tended to specialise the character of the offence redressible by the common law writs.[4]

Deceit.

We have seen that the writ of deceit originally lay only for some fraud committed in the course of legal proceedings;[5] and the intricacies of process afforded abundant opportunities for the commission of these frauds;[6] the following are some typical examples: A protection was given to a knight who was serving with the king in Scotland. Another knight of the same name deceived the court by its means; and the injured party was told by all the judges that it was a proper case for a writ of deceit.[7] Judgment was entered against a defendant by default, and then it was found that by the fraud of the plaintiff he had had no notice whatever of the proceedings.[8] A person counterfeited a statute merchant, which he put forward in lieu of a statute which had been satisfied and cancelled.[9]

It was in connection with the contract of sale that the earliest extension of the writ of deceit is to be found. In 1367[10] it appeared that the plaintiff had bought cattle from the defendant and paid the price; but that the defendant was not entitled to the cattle. It seems to have been agreed that he could recover damages for this fraud by a writ of deceit on the case. In Henry VI.'s reign there was a considerable development of the writ of deceit on the case along these lines; and we shall see that these writs covered much the same ground as that covered

[1] Y.B. 11 Hy. VII. Trin. pl. 7 *per* Hussey; F.N.B. 114 D; Coxe v. Wirrall (1607) Cro. Jac. 193.
[2] Above 318.
[3] Bk. iv Pt. I. c. 4.
[4] Ibid Pt. II. c. 5 § 3.
[5] Vol. ii 366.
[6] Below 623-626.
[7] Y.B. 32, 33 Ed. I. (R.S.) 468.
[8] Y.B. 33-35 Ed. I. (R.S.) 192; cp. a similar case in Y.B. 1, 2 Ed. II. (S.S.) 19.
[9] Y.B. 15 Ed. III. (R.S.) 314.
[10] 42 Ass. pl. 8.

by some of the writs of trespass on the case.[1] The man who had sold bad meat, or who had warranted the soundness of an unsound article, might be said to be liable either for a form of deceit, or, looking at the damage thereby caused to the plaintiff, for a form of trespass. But even at the end of this period we are only at the beginning of this development in the law. The writ of deceit was being extended; but there is no attempt as yet to analyse the nature of deceit. The law is inclined to look rather at the acts of the parties and the resulting damage than at their intentions;[2] and this tendency was emphasized by the fact that these deceits in the performance of a contract of sale could equally well be regarded as breaches of warranty. Owing to the fact that the writ had been extended in this way it was not till the following period that the action of deceit based on a false warranty was distinguished from an action for a false representation of fact,[3] and it was not till much later that actions of deceit for a false representation of fact became common.[4] It is not till our own days that it has been finally established that the plaintiff in such an action must prove an intention to defraud.[5]

As I said at the beginning of this chapter, we can see, in the tendency of the judges to extend the scope of trespass on the case, a prospect of many new developments. We have seen that in consequence it is possible to discern the germs of some of our modern principles of civil liability.[6] Bracton, when speaking of the action for a nuisance, made some attempt to distinguish between *damnum* and *injuria;* and we can see in this, as Maitland points out, "an incipient attempt to analyse the actionable wrong."[7] In fact the extensions of the actions of trespass and deceit and the consequent extensions of the sphere of liability,[8] made the problem of drawing the line between the *damnum* which was and the *damnum* which was not an *injuria* a very pressing problem at the end of this period.[9] Perhaps the best proof that the judges were disposed to extend the area of the

[1] Below 429 n. 3; see Bellewe 139-140. "Trespass sur cas eo quod le defendant vend a luy un chival et luy garrant d'estre bon et sane de touty maladies, lou le defendant sach le dit chival d'estre plein de maladies en le oyels et legges. *Pinchon.* Cest bref suppose faux et fraudulent vend, quel sound in disceit, jugement, *Et non allocatur*, 7 R. 2."

[2] When deceit on the case was brought for breach of warranty there was often an allegation that the defendant knew it to be false, Y.B. 9 Hy. VI. Mich. pl. 37; but it would seem that this allegation was not necessary, Y.B. 11 Ed. IV. Trin. pl. 10; a counsel said *arg.* in Y.B. 17 Ed. IV. Trin. pl. 2, "home n'avera action de chose que depend solement sur l'entent d'ascun person;" and this idea was not far from the minds of many lawyers at this period.

[3] Bk. iv Pt. II. c. 5 § 6. [4] Ibid. [5] Derry v. Peek (1889) 14 A.C. 347.

[6] Above 381-382. [7] P. and M. ii 532, 533. [8] Vol. ii 455, 456-457.

[9] Y.BB. 6 Ed. IV. Mich. pl. 18; 17 Ed. IV. Trin. pl. 2 the phrase is used to distinguish the case where an action lies from the case where it does not; see below 410 n. 8.

actionable wrong is to be found in one or two cases which show that they were beginning at the very end of this period to discuss actions on the case for defamation. But in order to understand the view which the law took of defamation at the end of this period I must say a few words of its earlier history.

In the reign of Edward I. the law had made provision for punishing defamatory rumours affecting the reputation of magnates. The first statute dealing with the offence of Scandalum Magnatum was passed in 1275.[1] It was re-enacted in 1379, and the classes of persons who could be reckoned magnates were defined.[2] In 1389 it was enacted that the disseminators of such tales should be punished if the originator could not be found.[3] These statutes were passed, not so much to guard the reputation of the magnates, as to safeguard the peace of the kingdom. This is obvious from the words of the statute of 1275;[4] and the same idea can be traced in the other two statutes.[5] The legislature fears that the good government of the country will suffer if tales are told "whereby discord may arise between the king and his people or the great men of this realm." This was no vain fear at a time when the offended great one was only too ready to resort to arms to redress a fancied injury. Such events as the rebellion of the Percys in Henry IV.'s reign will show us that the throne might be endangered by "the growth of a slander between the king and the great men of his realm." But it is probable that these statutes were not very effective. Coke can only cite two mediæval cases from the records known to him.[6] There is another case of Richard II.'s reign in the Rolls of Parliament, in which proceedings were taken against one John Cavendish, a fishmonger, who had accused the chancellor, Michael de la Pole, of bribery;[7] and from the sixteenth century onwards there is a thin stream of these cases.[8] Though it had

[1] 3 Edward I. c. 34; and see on this subject Jusserand, English Wayfaring Life 272.

[2] 2 Richard II. st. 1 c. 5. [3] 12 Richard II. c. 11.

[4] "From henceforth none be so hardy to tell or publish any false news or tales, whereby discord or occasion of discord or slander may grow between the king and his people or the great men of the realm;" it was for this reason that these actions were *qui tam* actions, Cromwell's Case (1578) 4 Co. Rep. at f. 13a; but its civil tended to become more prominent than its criminal aspect.

[5] Thus in 2 Richard II. st. 1 c. 5 it is recited that, in consequence of such slanders "Debates and slanders might arise betwixt the said lords, or between the lords and the commons . . . and whereof great peril and mischief might come to all the realm, and quick subversion and destruction of the said realm."

[6] Third Instit. 174—the cases of Adam de Ravensworth and John de Northampton; as we have seen above 392, the latter was probably not a case of scandalum magnatum. This may be due to the competition of the Constable and Marshal's Court, vol. i 580.

[7] R.P. iii 168-170 (7 Rich. II. nos. 11-15).

[8] Beauchamp v. Croft (1569) Dyer 285a; Earl of Lincoln v. Roughton (1607) Cro. Jac. 196; Viscount Ley v. Stephens (1629) Cro. Car. 135; all the former cases were fully considered in Lord Townsend v. Hughes (1677) 2 Mod. 105; cf. Comyn, Dig. *Action on the Case for Defamation*, B. 1-3.

long been obsolete, the offence of scandalum magnatum was not formally abolished till 1888.[1]

Unless the case fell within the provisions of these statutes the courts of common law declined to give any action for defamatory words. We have seen that this wrong had been recognized by the Anglo-Saxon laws;[2] and Bracton had, under the influence of Roman law, classed it with the wrong of trespass to the person.[3] But we have seen that the principle that no such action lay at common law had been solemnly laid down by Parliament in Edward I.'s reign.[4] It was only if the defamatory words were accompanied by some overt act, such as beating or destruction of property, that the court gave a remedy. Probably in such cases the words aggravated the damages.[5] At any rate plaintiffs in actions of trespass usually allege insults "inter alia enormia." For defamation pure and simple the plaintiff was obliged to resort either to the local courts, which, as we have seen, freely entertained such cases,[6] or to the ecclesiastical courts. The jurisdiction of the ecclesiastical courts was recognized both by the legislature[7] and the judges.[8] But it was soon seen that an unlimited jurisdiction over cases of defamation might be used, like an unlimited jurisdiction over breaches of faith was used, to get indirectly control over cases which ought to have gone to the king's court. Thus persons indicted and acquitted had a habit of suing the indictors for defamation in the ecclesiastical courts. It was enacted that in such cases a prohibition should lie.[9] In Edward IV.'s reign[10] we get an odd tale of a similar perversion of the action for defamation told of no less a person than the abbot of St. Albans. He had sent

[1] 50, 51 Victoria c. 59, which repealed the statutes creating it.

[2] Vol. ii 382 n. 11.

[3] f. 155. "Fit autem injuria non solum cum quis pugno percussus fuerit, verberatus, vulneratus, vel fustibus cæsus, verum cum ei convitium dictum fuerit, vel de eo factum carmen famosum et hujusmodi."

[4] Vol. ii 366. [5] P. and M. ii 536. [6] Vol. ii 382-383.

[7] 13 Edward I. st. 4 c. 1 § 8; 9 Edward II. st. 1 c. 4.

[8] Y.BB. 12 Hy. VII. Trin. pl. 2 (p. 24), "Le cas de diffamation est tout spirituel offence," *per* Fineux, C.J.; 17 Ed. IV. Trin. pl. 2, "Et sont divers cases en nostre ley lou home avera *dampnum sine injuria*, come le defamation en appellant un home laron ou traytor, cest damage en nostre ley, mes nul tort," *per* Nedham and Billing.

[9] 1 Edward III. st. 1 c. 11. We may note that in the MS. Register, described vol. ii App. VE (p. 619 n. 5), there are at ff. 28, 28b two writs of prohibition to meet the case where proceedings in the king's courts were made the basis of an action for defamation in the ecclesiastical courts; for an actual case see Y.B. 18 Ed. IV. Pasch. pl. 32—action for defamation founded on proceedings in the King's Bench for trespass de bonis asportatis.

[10] Y.B. 22 Ed. IV. Trin. pl. 47 and Mich. pl. 9; for Cardinal Morton's letter to the Abbot of St. Albans as to the illegal and immoral practices of himself and the monks see Gairdner, Lollardy and the Reformation i 269-273.

for a certain married woman, detained her in his chamber, and solicited her chastity without success. Her husband then sued the abbot for the imprisonment of his wife. The abbot thereupon sued him for defamation in the ecclesiastical court. In such a case the court found no difficulty in awarding a prohibition to the ecclesiastical court and declining to grant a writ of consultation. In self-defence, then, the courts of common law would prohibit certain actions for defamation. But, in spite of one doubtful case to the contrary,[1] it is clear that all through this period they declined to entertain actions merely for defamation. It is not till Henry VIII.'s reign, in the very last of the Year Books,[2] that we have any hint that the courts are beginning to think of claiming some share in this jurisdiction. Here, as in other branches of the law of crime and tort, the decline of the ecclesiastical courts and the competition of the court of Star Chamber led to important developments in the common law.[3]

[1] 30 Ass. pl. 19—an action by bill by Sir Th. Seton, "justice of our lord the king," against Lucy, the wife of one C., for that she in the presence of the treasurer and the barons of the Exchequer called him traitor, felon, and robber; the defendant aggravated her offence by pleading that the plaintiff had been excommunicated by a papal bull, see vol. ii 252 n. 1; this case probably forms no exception to the general rule, as it might be considered to be either a case of Scandalum Magnatum, or more probably a species of contempt, above 393; L.Q.R. xxv 242-244.

[2] Y.B. 27 Hy. VIII. Mich. pl. 4—action on the case for calling a man a "heretic and one of the new learning;" "Il est cler que cest action ne gist icy; car il est merement spirituel. Et si le defendant justifieroit que le pleintif est Heretique . . . nous ne pouvons discusser s'il soit heresie ou non; mes s'il fuit un chose ou pouvons determiner le principal, come *Thief* ou *Traitor* ou tiels, pro eux un action gist icy. . . . Ascuns choses sont mixez et punissable en ambideux Leys, come si un dit que auter tient *Bawdry* . . . et pro ceux on peut eslire ou il veut porter son cas."

[3] For these developments see Bk. iv Pt. I. c. 4; Pt. II. c. 5 § 2.

CHAPTER III

CONTRACT AND QUASI-CONTRACT

WE have seen that neither the Anglo-Saxons nor any of the other barbarian tribes who overran the Roman Empire had attained to the idea that agreements as such could be enforced by action;[1] but that in the twelfth and thirteenth centuries the study of Roman law had familiarized Europe with the Roman conception of contract.[2] That a bare agreement was not actionable was clearly to be learnt from that law. The agreement must be clothed with some one of many varied vestments before it could become a contract.[3] But under the influence of the canon law more and more attention was being paid to the bare agreement, less and less attention to the learning of vestments. "The ecclesiastical law gained a foothold within the province of contract by giving a Christian colouring to the old formal agreement, the pledge of faith. This having been accomplished, the canonists began to speak slightingly of ceremonies. . . . Even the 'nude pact' should be enforced, at any rate by penitential discipline."[4] But when the old theory that an agreement was not valid unless made in certain defined ways had been abandoned, it was difficult to arrive at any principle by which agreements could be satisfactorily distinguished from contracts. The test which was arrived at by the canon law was a much generalized form of the Roman "causa," which is the ancestor of the *cause* of French law and the law of other continental countries. This *cause* might consist in a moral obligation, or in the mere intention to make a present; but if it was entirely absent there was no contract. And if the promisee could have no substantial interest in the performance promised, there was no such interest as would amount to a *cause*.[5]

In England Roman theories of contract never took root. Bracton's book shows us that they did not fit English facts;

[1] Vol. ii 82-87.
[2] Ibid 191, 204, 265, 276.
[3] Ibid 275.
[4] P. and M. ii 193.
[5] Pollock, Contracts, App. note E; see Bk. iv Pt. I. c. 3 § 1 for a comparison between the continental theory and the English doctrine of consideration.

and after his time they ceased to influence the common law.[1] Nor was the common law influenced by the theories of the canon law; for, in spite of their continual efforts, the ecclesiastical courts were not allowed to interfere with ordinary agreements;[2] and we shall see that a theory of contract based on the canonist idea of causa, which was being worked out by the mediæval chancellors, failed to establish itself.[3] The one idea which the common law borrowed from the Roman law was the idea that bare agreements were not enforceable at law.[4] The common law borrowed nothing more positive than this; and therefore it was obliged to decide for itself what agreements should be enforceable—to evolve in fact its own theory of contract.

The theory of the English law of contract is contained in the doctrine of consideration. It is the presence of consideration which distinguishes a bare agreement from a contract. If we leave out of account the contract of record (which is no contract), the contract under seal, and the contracts required by special statutes to be made with special formalities, it would be true to say that every agreement coupled with a consideration is enforceable at law—is, in other words, a contract. This consideration, according to the classical definition,[5] "may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." It is wider in its scope than the *cause* as defined in modern French law; for "it does not matter whether the party accepting the consideration has any actual benefit thereby or not: it is enough that he accepts it, and that the party giving it does thereby undertake some burden, or lose something which in contemplation of law may be of value."[6] At the same time it is more definite and precise. It excludes such things as mere motives or moral obligations.

It is not till the end of this period that we begin to see in dim outline this doctrine of consideration upon which the English theory of contract rests. Some of the chief elements of it are present; but these elements have not yet been developed sufficiently to be summed up and expressed by the term "consideration." The law is as yet in the stage in which those

[1] Vol. ii 276, 287. [2] Ibid 305. [3] Bk. iv Pt. I. c. 4.

[4] This is expressed in Roman terms in Y.B. 11 Hy. VI. Pasch. pl. 30 (p. 38) where *Rolf* says, "Jeo die que ceo n'est 'pactum nudum' mais 'pactum vestitum':" cp. Y.B. 15 Ed. III. (R.S.) 136, "*Blaik.*—This I say, that he would not have an action for either except by way of covenant against his grantor. *Basset*, J.—Ex nudo pacto non oritur actio."

[5] Currie v. Misa (1875) L.R. 10 Ex. at p. 162.

[6] Pollock, Contracts (5th ed.) 166.

doctrines which it has about contracts are implicated in the law as to several different kinds of personal actions. It is therefore at the history of these personal actions, and at the ideas upon which they are based, that we must look, if we are to understand the manner in which the common law has evolved its own peculiar theory of contract.

The history of these personal actions falls into three fairly well marked periods. (1) The age of Glanvil and Bracton, in which the old ideas as to contract which have already been discussed were still prominent. (2) The end of the thirteenth, the fourteenth, and the beginning of the fifteenth centuries, in which these old ideas were remodelled and modified by the rules which regulated the conditions under which the older personal actions of covenant, debt, and account could be brought. (3) The latter part of the fifteenth, the sixteenth, and the beginning of the seventeenth centuries, in which we can see the beginnings of the career of the new action of assumpsit, under the influence of which the whole law of contract was destined to be reformed, and our modern theory of contract created.

The Age of Glanvil and Bracton

Glanvil's account of contract is coloured by Roman phraseology;[1] but, in spite of that phraseology, the older ideas still survive. He uses the Roman terms mutuum, depositum, commodatum, emptio venditio, locatio conductio; and, as I have said, transactions similar to those which are known by these names were doubtless familiar to the men of those days; but the law relating to them was not the Roman law. Sale is clearly stated to be a real and not a consensual contract;[2] and no clear distinction is drawn between these various transactions. They are all regarded as creating a debt;[3] and a debt, Glanvil tells us in one passage, is created sometimes by giving sureties, sometimes by giving some property as security, sometimes by pledge of faith, sometimes by writing.[4] These words are reminiscent of the ideas which were prevalent in Anglo-Saxon days. We see the real principle in the surety and the security; we see the

[1] Vol. ii 191, 204.

[2] Glanvil x 14, "Perficitur autem emptio et venditio cum effectu ex quo de pretio inter contrahentes convenit; *ita tamen quod secuta fuerit rei emptæ et venditæ traditio.*"

[3] Ibid x 3, "Is qui petit pluribus ex causis debitum petere potest; aut enim debetur ei quid ex causa mutui, aut ex causa venditionis, aut ex commodato, aut ex locato, aut ex deposito, aut ex alia justa debendi causa."

[4] Ibid x 3, "Cum quid autem creditur alicui solet illud plerunque credi sub pledgioruu datione, quandoque sub vadii positione, quandoque sub fidei interpositione, quandoque sub cartæ expositione, quandoque etiam sub plurium istorum simul securitate."

ecclesiastical influence in the pledge of faith; we see the formal principle in the writing.[1] But we may note that though Glanvil thus speaks of debts proved by pledge of faith, he makes it clear in other passages that the king's courts refused to enforce contracts made only with this formality;[2] and the Constitutions of Clarendon prohibited the ecclesiastical courts from attempting to do so, asserting that pleas of debt, whether or not contracted with pledge of faith, belonged to the jurisdiction of the royal courts.[3] Similarly he lets us see that the giving of a security, symbolic or otherwise, was ceasing to make an agreement binding.[4] Thus, although we see in Glanvil traces of the old ideas which will live long in popular custom and in outlying branches of the law,[5] we see clear signs of the newer ideas which will, in course of time, require an agreement either to be performed on one side or to be in writing if it is to be actionable. But as yet it is only debts which will be enforced if evidenced by writing. Even writing will not render mere "privatæ conventiones" actionable in the royal courts.[6]

In Bracton's account of contract the Roman element is stronger;[7] but in the case of the law of contract it is very much on the surface; and it has exercised the least influence of all Bracton's borrowings upon the fabric of the law. In his day it is at the rules which regulate the personal actions that we must look for such living rules upon the subject of contract as the common law possessed. These rules were beginning to exercise a more decisive influence upon the fabric of the law than in the earlier period, because of the rapid increase in the number of writs "of course."[8] The writ of debt was a luxury to be purchased at a high price in Glanvil's day,[9] and he does not mention the writ of covenant. In Bracton's day both these writs were commonly used. Though, therefore, Bracton has copied many more Roman rules than Glanvil, we are not surprised to find that the actual principles of the law are much the same as they were in Glanvil's day. Thus we can see the real principle in the

[1] Vol. ii 83-87.

[2] Glanvil x 12, "Creditor ipse si non habeat inde vadium nec plegium, nec aliam diracionationem, nisi sola fides, nulla est hæc probatio in curia domini regis."

[3] c. xv.

[4] P. and M. ii 200, 201; cp. Glanvil x 6, 7 (there cited), and his treatment of earnest in x 14, P. and M. ii 206.

[5] Vol. ii 87.

[6] "Predictos vero contractus qui ex privatorum consensu fiunt, brevitur transigimus, quia ut predictum est, privatas conventiones non solet curia domini regis tueri, et quidem de talibus contractibus qui quasi privatæ quædam conventiones censeri possunt, se non intromittit curia domini regis," Glanvil x 18, see also ibid x 8; cp. Street, Foundations of Legal Liability ii 8-10, who I think rightly distinguishes the sealed writing evidencing a debt, and other covenants evidenced by sealed writing.

[7] Vol. ii 275-277. [8] Ibid 245, 513-514. [9] P. and M. ii 203, 204.

transfer of money or chattels which must be alleged and proved if one would succeed in an action of debt; and the formal principle in the writing, identified by Bracton with the *stipulatio*, which gives rise to the action of covenant. It is clear, however, from Bracton's words that, though generally it was only debts evidenced by writing which would be enforced in the king's courts by action of debt, these courts were beginning as a special favour to think of enforcing by action of covenant "privatæ conventiones," provided that they were evidenced by writing.[1] But the new principles which determine the action of the king's courts have not yet quite got that sharpness of outline which they will get in later law, nor have all the older principles disappeared. Thus it is not yet quite settled that the writing which will give rise to an action of covenant must be a sealed writing;[2] and a verbal contract of suretyship was then and for some time to come enforceable—it is still remembered that the surety originally gave himself as a security, and that "in later days there has been a formal ceremony with a *wed* or a *festuca*."[3] But the royal courts were still more firmly declining to enforce agreements made with pledge of faith, and were regularly prohibiting the ecclesiastical courts if they discovered them attempting to do so. Though these courts, in spite of royal prohibitions, long continued to exercise much jurisdiction of this kind, it is clear that, according to the common law as laid down in the royal courts, the real and the formal principles were fast coming to be the only two recognized. As we have seen, Bracton practically admits that there is no such thing as a consensual contract in English law.[4]

It may be noted that both Glanvil and Bracton recognize in some cases the interest of one who holds to the use of or on account of another.[5] This is a conception which will bear more fruit in the law of property and in the law of quasi-contract than in the law of contract.[6] We must here just note that it is one of those primitive legal conceptions which, together with the real and the formal principles, are at the root of some of those older personal actions which shaped such law of contract as was possessed by the common law during the larger part of the mediæ-

[1] "Quae ex conventione utriusque partis concipitur . . . et quarum totidem sunt genera, quot paene rerum contrahendarum, de quibus omnibus omnino curia regis se non intromittit, nisi aliquando de gratia," f. 100a.

[2] Below 417 n. 2.

[3] Y.B. 7 Ed. II. 242; Holmes, Common Law 260; P. and M. ii 209; vol. ii 84; below 424 n. 6.

[4] Vol. ii 277.

[5] In Glanvil in the case of the executor, Glanvil vii 6, 8; L.Q.R. i 164, 165; for Bracton see the Note Book cases 641, 754, 999, 1244, 1683, 1581; and see P. and M. ii 231-236, note on the early history of the use.

[6] Bk. iv Pt. I. c. 2; below 426; vol. ii 593-595.

val period. To the development of these older personal actions we must now turn.

The Thirteenth, Fourteenth, and Early Fifteenth Centuries

The personal actions of covenant and debt[1] are the two personal actions which have influenced the early development of the law of contract.

The action of covenant was the action which was brought upon instruments which were enforceable by virtue of their form. After a period of hesitation it was settled in Edward I.'s reign that that form must be a writing which is sealed.[2] The older forms had disappeared. The new form is "no product of the ancient folk-law. The 'act and deed' that is chosen is one that in the past has been possible only to men of the highest rank." Here, as in other branches of the law, the law for the great has become common law for all.[3] The reason why a sealed writing was regarded as having this effect was perhaps the fact that it was only the sealed writing which could be received as irrebuttable evidence that the person whose seal is attached was bound. Such person was originally bound, not because the sealed writing evidenced an agreement, but because it was conclusive proof that the defendant had come under a liability to the plaintiff.[4] But when once this conclusion as to the probative effect of the sealed writing has been reached, "It is a short step to holding as a matter of law that 'a deed' . . . has an operative force of its own which intentions expressed never so plainly in other ways have not."[5]

[1] For the writs see App. Ib (3), and (1).

[2] See the authorities collected in P. and M. ii 218 n. 1; and cp. H.L.R. vi 400. In Y.B. 20, 21 Ed. I. (R.S.) 222 the absence of a writing is unsuccessfully pleaded in an action of debt, and (apparently) successfully in an action of covenant; in Y.B. 30 Ed. I. (R.S.) 158 the absence of the seal is noted; the rule is clearly stated in Fleta ii 60. 25, "Non solum sufficiet scriptura nisi sigilli munimine stipulantis roboretur cum testimonio fide dignorum præsentium;" it is assumed in Y.B. 32, 33 Ed. I. (R.S.) 198, 200; in the Eyre of Kent (S.S.) ii 35 Herle *arg.* maintained that a tally was no specialty—"a man may notch or carve these notches at his will or may shave them away without anyone knowing anything about it," and this view seems to have prevailed, see ibid 57 *per* Bereford, C.J., who applied Herle's reasoning to a sealed tally; Core's Case (1537) Dyer at f. 23a; but it seems to have been thought that, though an averment that nothing was due could be made in answer to a sealed tally, there could be no wager of law if the plaintiff produced such a tally, Y.B. 3 Ed. II. (S.S.) 46-47.

[3] P. and M. ii 220-223.

[4] "If a man by a writing confesses himself indebted to us, and the writing goes on to say 'and for further security I procure such an one who binds himself,' and this latter affixes his seal to the writing, how can you argue that he does not say the same thing as the other man says? He affirms it by the fact of affixing his seal; and so you must answer to the deed," *per* Spigurnel, J., the Eyre of Kent (S.S.) ii 10.

[5] P. and M. ii 218; we can see the transition if we compare a passage from Bracton with a later Y.B.; Bracton f. 100b says, "Si quis scripserit alicui se debere

In the case, however, of those writings which evidenced a debt[1] it was several centuries before this short step was taken. If money was handed over so that a debt was created, or if chattels were bailed, and the transaction was evidenced by a deed, the deed was considered merely as evidence of the transaction, and not as actually effecting it. It was irrebuttable evidence, it is true, but only evidence; and therefore the proper remedy was the action of debt or detinue and not the action of covenant.[2] It was not till 1585 that the Queen's Bench allowed covenant as an alternative to debt in such a case;[3] and it was probably not till late in the first half of the seventeenth century that the Court of Common Pleas followed suit.[4]

In the case of other agreements evidenced by sealed writing it would seem that this short step was taken almost immediately. We have seen that in the time of Bracton the king's court occasionally enforced these agreements.[5] In fact, in the thirteenth century various arrangements relating to land—agreements to levy a fine, to let land for a term of years, to settle land by way of feoffment and covenant for refeoffment[6]—were enforced by writ of covenant; and there is some evidence that an attempt was made to establish by means of these covenants a sort of modified villeinage.[7] Clearly the scope of covenant was being

sive pecunia numerata sit sive non, obligatur ex scriptura nec habebit exceptionem pecuniæ non numeratæ contra scripturam;" in Y.B. 8 Rich. II. (Bellewe 111, cited Salmond, Essays in Jurisprudence 181) it is said, "En dette sur contract le plaintiff monstra in son count pur quel cause le defendant devient son dettour. Autrement en dette sur obligation, car l'obligation est contract en luy meme."

[1] Above 415 n. 6.

[2] This comes out clearly enough in the Y.BB. See Y.B. 39 Hy. VI. Mich. pl. 46 where *Prisot*, C.J., said, "Si jeo baille biens per fait indente et puis port detinue pur ceux jeo ne count ore sur le fait indente pur ce que n'est que chose testmoignant le bailiment;" cp. Y.B. 6 Hy. IV. Hil. pl. 34, "En briefe de Covenant il recovera damages pur chescun covenant enfreint . . . mes en det il recovera forsque le summe comprise deins l'obligation per cause del covenant enfreint;" as Ames says, Lectures on Legal History 152, "Such a covenant being regarded as a grant of the money or chattels, debt was the appropriate action for their recovery."

[3] Anon. 3 Leo. 119, cited Ames, Lectures 152.

[4] In the case of Chawner v. Bowes (1589) Godb. 217 Warburton and Nichols, J.J., denied that covenant lay; and in Brown v. Hancock (1628) Het. 111, 112 the same view was expressed in argument; Ames says, Lectures 153, "Precisely when the Common Bench adopted the practice of the King's Bench it is perhaps impossible to discover; but the change was probably effected before the end of the reign of Charles I."

[5] Above 416 n. 1.

[6] P. and M. ii 214, 215; for specimens see Madox, Form. nos. 628 (option to purchase); 635 (suretyship); 536, 541 (money bonds).

[7] Bracton ff. 208b, 209a, "Est etiam vilenagium non ita purum, sive concedatur libero homini vel villano, ex conventione tenendum pro certis servitiis et consuetudinibus nominatis et expressis, quamvis servicia et consuetudines sunt villanæ. Et unde si liber ejectus fuerit, vel villanus manumissus vel alienatus, recuperare non potuerunt ut liberum tenementum, cum sit villenagium, et cadit assisa, vertitur tamen in juratam ad inquirendum de conventione, propter voluntatem dimittentis et consensum;" see H.L.R. vi 399; above 30.

gradually enlarged; and it is clear from the Statute of Wales (1284)[1] that by that date any kind of agreement could be enforced by action of covenant.[2] In the fourteenth and fifteenth centuries it was a general remedy which covered the whole field of executory contracts. The commonest defence to actions on such contracts was that the plaintiff had no sealed writing.[3]

These covenants or contracts under seal were thus, as Holmes has said,[4] "no longer promises well proved." They had come to be "promises of a distinct nature for which a distinct form of action was provided." In later days, when the doctrine of consideration had come to be the most distinctive feature of the English law of contract, these contracts under seal were thought to be brought into line with the general rule requiring consideration, by saying that the seal imports a consideration, and that the parties were therefore bound. This view that the seal imports a consideration was put forward as early as 1566;[5] but at that date the theory of consideration was not completely developed;[6] and the expression was there used somewhat metaphorically to express the undoubted truth that the operation of the seal upon the agreement was similar to the operation of a consideration, in that it made it enforceable at law. But if the expression is used to mean that consideration is presumed,[7] it obviously gives a wholly false view of the reason why the stipulations in an instrument under seal are enforceable. They are enforceable by reason, not of the presumption of consideration, but of the form of the instrument, and in fact there are

[1] 12 Edward I.

[2] Dealing with the writ of covenant it says, "Quia infiniti sunt contractus conventionum difficile esset facere mentionem de quolibet in speciali," cited P. and M. ii 216 n. 2.

[3] E.g. Y.BB. 43 Ed. III. Mich. pl. 38; 2 Hy. IV. Mich. pl. 9.

[4] Holmes, Common Law 272-273.

[5] Sharington v. Strotton Plowden at p. 309—"Where it is by deed, the cause or consideration is not enquirable, nor is it to be weighed, but the party ought to answer to the deed, and if he confesses it to be his deed, he shall be bound, for every deed imports in itself a consideration, viz. the will of him that made it, and therefore when the agreement is by deed, it shall never be called a *nudum pactum*. And in an action of debt upon an obligation, the consideration upon which the party made the deed is not to be enquired, for it is sufficient to say that it was his will to make the deed."

[6] Bk. iv Pt. II. c. 3 § 1.

[7] "So thoroughly has this conception (the doctrine of consideration) established itself in recent times that having made the presence of a consideration one of the general conditions of a valid contract, we are now accustomed to bring contracts under seal within the terms of the condition by saying that when a contract is under seal the consideration is presumed," Pollock, Contracts (5th ed.) 131; as is there pointed out "the ancient reason why a deed could be sued upon lay, not in a consideration in our present sense of the word being presumed from the solemnity of the transaction, but in the solemnity itself;" as Markby says, Elements of Law (3rd ed.) 309, "To say that a deed imports consideration is only another way of saying that a promise under seal may be sued on without consideration;" a case where this erroneous idea appears is Mitchel v. Reynolds (1711) 1 P. Wms. at p. 193.

many sealed writings upon which an action can be brought, which cannot be brought into line with any theory of contract.[1]

In the Middle Ages the action of covenant, as thus developed so as to remedy the breach of any agreement entered into by writing under seal, was a more purely contractual action than any other known to English law. By means of it alone could unliquidated damages be got for breach of an executory contract. It is therefore an important action because it helped to familiarize English lawyers with the idea of contract. As we shall now see, debt was not properly a contractual action at all; and, owing to the limitations upon its scope which arose from this cause, and to other disadvantages from which it suffered, it was a very inadequate remedy for the enforcement of contracts.

I have already said something of the nature of the action of debt. We have seen that originally it was hardly distinguishable from detinue, but that in course of time debt (especially if brought in "the debet") tended to become somewhat more contractual in its nature, while detinue tended to become somewhat more proprietary or delictual.[2] In fact, actions of debt, like actions of covenant, were as often as not brought upon contracts; and just as contracts under seal were supposed to be brought into line with the general theory of contract by the fiction that the seal imports consideration,[3] so all causes of action upon which the action of debt could be brought were by various fictions supposed to be of contractual origin.[4] But, in spite of this, neither debt nor detinue ever became completely contractual or completely proprietary or delictual. The fact was never lost sight of that the action of debt was based upon mutual grants; and it could be brought for many causes of action which were far removed from contract.[5] On the other hand, though the action of detinue was generally used to enable owners to assert their right to the possession of chattels, the oldest form of detinue—detinue sur bailment—might be regarded as founded on a contract.[6] At this point we are concerned with the most important class of actions of debt—those based on a contract.

In the action of debt "the defendant was conceived of as having in his possession something belonging to the plaintiff which he might not rightfully keep but ought to surrender."[7] Now, it is clear that if A had sold, or lent, or deposited goods

[1] Pollock, Contracts 6-7.
[2] Vol. ii 368.
[3] Above 419.
[4] Salmond, Essays in Jurisprudence 177, 178; and cp. Y.B. 9 Hy. IV. Mich. pl. 8 *Hulls* says, "Action personal est properment action de Trespass ou de Debte . . . et auxint tiels actions surdent de tort fait al person d'un home, ou de contract enter person et person."
[5] Vol. ii 368; below 425.
[6] Above 324.
[7] H.L.R. vi 260.

to or with B for a fixed sum, and A wished to be paid that sum, the action of debt would lie. It is equally clear that till the possession of the goods had been handed over no such action could be brought. The action of debt, therefore, was the appropriate action by which many of the commonest classes of contracts could be enforced, provided that one of the parties to the contract could prove that he had so far performed his part of the contract that he could allege that the defendant owed him a debt. Therefore the condition precedent for the liability of the defendant upon such a contract was the fact that he had received something from the plaintiff. In other words, the plaintiff could not sue upon such a contract unless he could show some "*quid pro quo*" for the defendant's promise.[1] As Sir John Salmond says, "The cause that led to this generalization respecting *quid pro quo*—to this explicit statement of what had been implicit from the beginning—was probably the disturbing influence of the idea that simple contract debts were really based on mere agreement, and the consequent necessity of defining the limits within which an agreement was obligatory."[2] That this generalization had been arrived at at least as early as 1339 is clear from the following passage from a Year Book of that date.[3] "A writ of debt was brought against one; and he counted that the plaintiff, by covenant between him and the defendant, had been made his attorney for ten years, taking 20s. for every year, which were in arrear. . . . *Pole.*—He has nothing showing the covenant. *Sharshulle*, J.—If one were to count simply of a grant of a debt he would not be received without a specialty; but here you have his service for his allowance, of which knowledge may be had, and you have *quid pro quo*." Between this date and the reign of Henry VI. we do not get many references to *quid pro quo* under that name; but it is clear that the principle is quite familiar.[4] In Henry VI.'s reign it is

[1] Salmond, Essays in Jurisprudence 181, 182; Maitland says, P. and M. ii 211, 212, "We may take it as a general principle of ancient German law that the courts will not undertake to uphold gratuitous gifts or to enforce gratuitous promises. . . . We may doubt whether in the thirteenth century a purely gratuitous promise, though made in a sealed instrument, would have been enforced, if its gratuitous character had stood openly revealed."

[2] Op. cit. 182; Y.B. 9 Hy. IV. Mich. pl. 8, above 420 n. 4.

[3] Y.B. 11, 12 Ed. III. (R.S.) 586; cp. Y.B. 16 Ed. III. (R.S.) ii 526; in Y.B. 1, 2 Ed. II. (S.S.) 161 we see the generalization, but not the name for it, *Bereford*, J., says, "When the parson ought to have had an estate by the grant of the prior he had nothing. Would it then be reason that he should be condemned in a debt?" In Y.B. 20, 21 Ed. I. (R.S.) 367 the term "cause" is used.

[4] Salmond, Essays in Jurisprudence 183; Holmes, Common Law 267, 268; in Y.B. 19 Ed. III. (R.S.) 100 *Stonore*, C.J., says, "There is *quid pro quo;* and so there is a bargain of which the court will have cognizance;" in Y.B. 12 Rich. II. 234 *Rikhill arg.* says, "issint del heure que nous ne pouvons avoir *quid pro quo* nous demandons jugement si encountre ceo matiere accion deviez avoir."

taken to be settled law. This is illustrated by two cases (the facts of which were identical) which occurred in that reign.[1] In both these cases A brought an action of debt against B, alleging that B had promised A a sum of money if he married B's daughter, that A had married the daughter, and that B had declined to pay the money; and in both the whole argument turned on the question whether the marrying of the daughter was sufficient *quid pro quo* for the promise to pay.

These two cases illustrate very clearly the evolution of the conception of *quid pro quo*, and the fact that, through its extension, a wider scope was given to the action of debt. The general idea of *quid pro quo* was benefit to the defendant; and anything of value which the plaintiff had conferred upon the defendant was a *quid pro quo*. But men's conception of what could be regarded as conferring a thing of value upon the defendant were at first somewhat narrow and material. Thus, in the first of these cases, Paston, J., denied that the fact that the plaintiff had married the defendant's daughter could be a *quid pro quo* for the defendant's promise.[2] He had not directly done anything for or given anything to *him*. But in the second of these cases some of the judges were clearly of opinion not only that the marriage was a benefit which could be regarded as in effect a *quid pro quo*, but also that any benefit conferred upon a third person at the defendant's request could be similarly regarded.[3] In the sixteenth and seventeenth centuries this view seems to have prevailed,[4] though, as we shall see, the growth of the action of assumpsit prevented its definite solution from being a question of much practical importance. Thus the conception of *quid pro quo* had been extended from the notion of doing something for or giving a physical something to the defendant, to the doing

[1] Y.BB. 7 Hy. VI. Mich. pl. 3; 37 Hy. VI. Mich. pl. 18.

[2] "Il ad declare coment il aura eu la file, etc., mes il n'ad declare que le defendent aura *quid pro quo*," Y.B. 7 Hy. VI. Mich. pl. 3; in this Paston followed Y.B. 9 Hy. V. Mich. pl. 23, cited Ames, Lectures on Legal History 93, in which it was held that a release by the plaintiff of a debt due to him from T. was no *quid pro quo* for the defendant's promise to pay him T.'s debt.

[3] "Sicome jeo die a un home que s'il voile carier xx quarters de frument de Mon. maistre Prisot a G. il aura xlv, or sur le matiere s'il carie les xx quarters il aura bon action de Det vers moy des xlv, et encore la chose n'est fait a moy, eins per mon commandement," Y.B. 37 Hy. VI. Mich. pl. 18 (p. 8) *per* Danvers, J.; "Sicome jeo die a un Surgeon, que s'il voile aller a un J. qui est malade, et luy doner medicine, et face luy safe and sound il aura c.S. or si le dit surgeon done al dit J. medicine et luy face safe and sound, il aura bon action de Debte vers moy des c.S. et uncore la chose est a un autre et memy al defendant meme: et issint n'ad il *quid pro quo*, mes tant en effect," ibid p. 9 per Moyle, J.; in Y.B. 17 Ed. IV. Trin. pl. 4, Rogers and Suliard thought that a marriage was *quid pro quo*, but Choke and Littleton apparently agreed that as the matter concerned marriage it was not a matter for the common law courts.

[4] See Stonehouse v. Bodvil (1663) T. Raym. 67, and the dicta in other cases of actions of assumpsit cited by Ames, Lectures 93-94.

something for or giving something to another at his request, which could be regarded as a benefit to him. It was quite clear however that the benefit, whether conferred on the defendant himself or on a third person at his request, must have been actually conferred. A mere promise to confer it was not sufficient. But here again we can see a modification of the original rule. We have seen that in the case of a contract to sell goods the promise to convey was regarded as a sufficient *quid pro quo* for the promise to pay.[1]

We shall see that these two extensions of the original scope of the action were of considerable service to the lawyers when they began to develop the action of assumpsit; for both afforded analogies which could be made to justify extension. The extension of the conception of what could be regarded as a *quid pro quo* helped to suggest the limits within which assumpsit should be allowed for a non-feasance in breach of an undertaking;[2] and the fact that an action lay on a contract of sale, though the goods had not been delivered and the price had not been paid, was used to justify the extension of the action, firstly to certain cases of non-feasance in breach of an undertaking,[3] and secondly to remedy the breach of wholly executory contracts.[4]

But, in spite of these developments, the action of debt was for several reasons an inconvenient action. Firstly, wager of law was in many cases possible, and when wager of law was possible the action did not lie against the representatives of a deceased person.[5] Secondly, the plaintiff must be prepared to prove the exact amount of the debt. If he could not prove that the exact sum which he claimed was due he lost his action;[6] and great particularity was required in his declaration.[7] Thirdly, the greatest of all its defects lay in the fact that by it claims for unliquidated damages for the breach of executory contracts could not be enforced. It followed that there was no remedy for the enforcement of such contracts unless an agreement under seal had been made. That this was an inconvenient state of the law was practically admitted in Edward III.'s reign, in a case which shows us the manner in which this inconvenience will hereafter be remedied.[8] Its inconvenience may indeed have been mitigated by the fact that the local courts and the courts of boroughs

[1] Above 355-356; below 436; cp. H.L.R. xi 261-262.
[2] Below 436-439, 445-456. [3] Ibid. [4] Ibid.
[5] Vol. i 307; below 578; cp. Y.B. 12 Rich. II. 24.
[6] Y.B. 3 Hy. VI. Mich. pl. 4 (p. 5).
[7] See Ames, Lectures 153, cited below 444 n. 5.
[8] Y.B. 48 Ed. III. Hil. pl. 11—action on the case for negligence in failing to cure a horse; *Candish* called the action an action of covenant, and said, "Cest action de covenant pur necessity est maintenant sauns especiality pur ceo que pur cy petit chose home ne puit my aver tout temps clerke pur faire especiality;" see the case noted by Holmes, Common Law 281, 282.

enforced many covenants which were not under seal.[1] Indeed, the fact that many boroughs by custom enforced such contracts was allowed in some cases to be a recognized exception to the common law rule.[2] But these mitigations tended to become less real as the king's courts, by gradually absorbing the greater part of the litigation of the country, made the common law still more common. And as its rules became more rigid[3] it was more and more strongly felt that the fetters imposed upon the growing law of contract by the limitations of these personal actions were too burdensome. Here, as in other branches of the law, the limitations drawn by the common law scheme of writs had made the law certain at the price of eliminating many older ideas which, if they had been retained, would have made for expansion.[4] For instance, just as the rigid rules as to the transference of seisin had driven the conception of the Use from the land law,[5] so the rigid rules which bounded the actions of covenant and debt had prevented a verbal contract of suretyship from being enforced,[6] and had made it impossible to enforce any simple executory contract. That a remedy which could enforce such contracts was demanded can be seen (i) from the fact that the ecclesiastical courts were able, in spite of writs of prohibition, to maintain an effective rivalry all through this period;[7] and (ii) from the fact that the chancellor was prepared to supply a remedy.[8] Fortunately for the common law, the need for enlarging its forms of action became so pressing that something was done to meet that need before its growing rigidity and the increasing activity of the chancellor had allowed the opportunity to slip. But, before I can deal with the manner in which the common lawyers met that need, I must first say something of the manner in which the conception of quasi-contract originated from the working of some of these older personal actions.

In our modern law there are a large number of obligations which hover on the border line of contract.[9] Some of them are

[1] Vol. ii 382, 388-389.

[2] F.N.B. 146 A; Y.B. 14 Hy. IV. Hil. pl. 33, "Ils sont divers actions que home puit aver deins la Citee de Loundres, que home n'avera my a la common ley, come action de Covenant sauns especialty."

[3] Cp. for the less rigid view Y.B. 21, 22 Ed. I. (R.S.) 458; vol. i 539 n. 4.

[4] Vol. ii 344-347, 592-595.

[5] Ibid 593-594.

[6] Such a contract was, as we have seen (above 416), originally enforced; it was laid down Y.BB. 18 Ed. III. (R.S.) 22, and 44 Ed. III. Trin. pl. 23, that such an action was not maintainable. Here, again, there might be an exception by virtue of special custom, F.N.B. 122 K n.; as Holmes says (L.Q.R. i 172), "Logic, that great destroyer of tradition, pushed suretyship into the domain of covenant, and the more frequent and important real contract succeeded in dividing the realm of debt with instruments under seal."

[7] Vol. ii 305.

[8] Bk. iv Pt. I. c. 4.

[9] Pollock, Contracts (5th ed.) 11-13; Anson, Contracts (12th ed.) 394-397.

real though tacit contracts, because, though there is no express agreement, there is an implied consent. They may therefore be properly styled implied contracts. Others are not contracts at all because there is no consent; but the law, in order to give a remedy, when a remedy is plainly desirable, treats the parties as if they had consented. They are sometimes styled contracts implied in law, or more properly, quasi-contracts. The manner in which at different periods the common law has treated these various obligations has tended to obscure their real nature. Their shape has been determined by the remedies by which at different periods they have been enforced; and either because the courts have attended rather to the form and development of the remedy than to the nature of the right protected, or because they have allowed some of these remedies to be extended to rights of very various natures by fictitious averments, the law relating to them is somewhat heterogeneous and confused. We shall see that the first of these causes is plainly apparent in the mediæval development of this branch of the law; and that the second is equally plainly apparent in its modern development, owing to the shifts resorted to make some form of assumpsit applicable to those miscellaneous obligations.

During this period the two actions which helped forward the development of this branch of the law were the actions of debt and account.

We have seen that the action of debt was very amorphous in its character. It was proprietary; and this in early days was perhaps its leading characteristic.[1] But, as we have just seen, it was sufficiently contractual to be capable of being used to enforce certain varieties of contract;[2] and it had also a certain delictual element.[3] Therefore, as we have seen, it could be used to enforce many various obligations which are very remote from contract. Thus it could be used to recover statutory penalties, forfeitures under bye-laws, amercements, and money adjudged to be due by the judgment of a court.[4] It is largely because judgments could be so enforced that English law has come by that variety of quasi-contract which it styles a contract of record. And the development of the actions of debt and detinue helped also to introduce another variety of quasi-contract. During the fourteenth century it was clear law that if A bailed goods to B for the benefit of C, C could sue B in Detinue.[5] There is at least one authority which shows that as early as Edward I.'s reign Debt would lie at the suit of a beneficiary if money had

[1] Vol. ii 368. [2] Above 420-423. [3] Vol. ii 368.
[4] Ibid 367. [5] Above 355 and n. 6.

been given to a third person for his benefit;[1] and this principle was certainly established in the reign of Henry VI.[2] Obviously in such a case there is no contractual relation between the receiver of the money and the beneficiary. But, as the beneficiary had a right of action, his right to the money was just such a right as the later lawyers classed as quasi-contractual. But it is probable that the competence of Debt to enforce this and other analogous obligations owes something to the development of the action of account, through which obligations in the nature both of implied contracts and quasi-contracts were enforced.

We have seen that the action of account became a regular form of action towards the end of Henry III.'s reign, and that it was made more efficacious by statutes of 1267 and 1285.[3] The action was, as Maitland says, founded upon the proprietary writs. The plaintiff demanded that the defendant should "render" the account.[4] It was really founded upon quasi-contractual rather than contractual relationship; for it gave effect to the principle that "one who had received money from another to be applied in a particular way was bound to give an account of his stewardship."[5] Thus it was used, "sometimes exclusively, sometimes concurrently with debt, to enforce claims of the kind which in modern times have been the subject of actions of assumpsit for money had and received or the like."[6] In this way it gave some recognition to the principle that there should be some remedy against one who holds to the use of another; and, on that account, it was a popular action in the fourteenth century.[7] The fact that there was no such action where one held land to the use of another was one cause for the rise of the chief branch of the chancellor's equitable jurisdiction.[8] In the end it was superseded by the more convenient remedies which the superior machinery of the court of

[1] Y.B. 33-35 Ed. I. (R.S.) 238; and the court seems to have held the same view in Y.B. 41 Ed. III. Pasch. pl. 5.

[2] "Quand un home paye a un autre certain monoie per mon commandment a mon oeps, si cestuy que receut cel monnoie ne veut a moy payer, jeo aurai bon brief de *Det* ou *Accompt* envers luy," Y.B. 36 Hy. VI. pl. 5 at pp. 9-10 *per* Wangford *arg.*; Y.B. 39 Hy. VI. Hil. pl. 7 *per* Laicon; see Ames, Essays A.A.L.H. ii 743 and cases there cited.

[3] Vol. ii 367.

[4] P. and M. ii 219; for a good general description of the nature and scope of the action see Langdale, Equity Jurisdiction H.L.R. ii 250 seqq. The following is the form in the Register f. 135b, "Præcipe A quod juste, etc., reddat abbati de Evesham rationabile computum suum, etc.;" App. IB (4).

[5] Ames, Lectures 163.

[6] Pollock, Contracts 139, 140; see e.g. Y.BB. 33-35 Ed. I. (R.S.) 294; 1, 2 Ed. II. (S.S.) 107; 2, 3 Ed. II. (S.S.) 34; 14 Ed. III. (R.S.) lxviii, lxix.

[7] Y.B. 20 Ed. III. (R.S.) ii xxvii seqq.

[8] Ames, H.L.R. vi 258, says, "That the defendant's duty to account whether as bailiff or receiver arose from his receipt of property as a trustee, and that a plaintiff entitled to an account was strictly a cestui que trust. In other words, trusts for the payment of money were enforced at common law long before Chancery gave effect to trusts of land. It need not surprise us, therefore, that upon delivery of money by

Chancery was able to offer,[1] and it survived only as a remedy as between tenants in common. Though, as Maitland has said,[2] it did little or nothing for the development of the law of contract, it did, as we shall now see, something for the development of the law as to implied contract and as to quasi-contract.

It is clear that in some of the cases in which account lay there is an implied contract—the element of consent is present. If I hand over money to another to employ for my use, or if one whom I have made my factor or bailiff receives money on my account, the receiver of the money, or the factor or bailiff, do in fact consent to hold it on my account, and to hand it over or otherwise to account for it to me. But if we are regarding these rules, not so much from the point of view of the modern theory that the essence of contract is consent, as from the point of view of the duty to pay enforced by the action of account, it is clear that the duty of a receiver of money to pay to a third person on whose behalf he has received the money, is not very different from his duty to pay to the person from whom he has received it.[3] Hence it is not surprising to find that, from the fourteenth century onwards, the action of account could be brought by the third person on whose account the money had been received;[4] and it is clear that this is a quasi-contractual duty of the same kind as that which was enforced by the action of debt. It was not a very long step to take to hold that if A, by reason of a mistake or in consequence of false or fraudulent representations made by B, had paid money to B, he could bring Account against B. This step was taken at the end of the sixteenth century;[5] and the allowance of a right of action in cases of this type could clearly be regarded as an example of the application of "the equitable principle which lies at the foundation of the great bulk of quasi-contracts, namely, that one person shall not unjustly enrich himself at the expense of another."[6] No doubt, as Ames says,[7] "This principle established itself very

A to B to the use of C or to be delivered to C, C might maintain an action of account against B. . . . The words 'to the use of' still bear witness to the trust relation."

[1] Bk. iv Pt. I. cc. 4 and 8. [2] P. and M. ii 220.

[3] Thus as Street says, Foundations of Legal Liability ii 205, the many various duties in the nature of debt and enforced by the action of debt "make up a homogeneous mass, the principle of liability being the same in all of them;" but that "when viewed from the standpoint of assumptual obligation they fall into two distinct classes, viz. the so-called implied contracts (contracts implied as of fact) and the quasi-contracts (contracts implied as of law);" it was from the standpoint of debt that they were regarded by the mediæval common law, because, till the development of assumpsit, the modern and logically correct distinction between implied contracts and quasi-contracts was hardly conceivable.

[4] Y.BB. 41 Ed. III. Pasch. pl. 5; 36 Hy. VI. pl. 5 cited above 426 n. 2; Ames, Essays A.A.L.H. ii 743 n. 5; Core's Case (1537) Dyer at f. 21a *per* Mountague *arg.*; Lincoln v. Topliff (1597) Cro. Eliza. 644; Harris v. Bervoir (1625) Cro. Jac. 687; cp. Ames, Lectures 163.

[5] Hewer v. Bartholomew (1597) Cro. Eliza. 614.

[6] Ames, Lectures 162. [7] Ibid.

gradually in the common law;" but, it seems to me, he is right in pointing to the action of account as the chief instrument by which this principle was first suggested to the minds of the common lawyers.

But, though the first suggestion of this principle may have come through the action of account, it was not through this action that it was destined to be developed. We have seen that even in the Middle Ages it was recognized that in certain cases Debt and Account were concurrent remedies.[1] In the sixteenth and seventeenth centuries the rule was established that in all cases in which Account lay for a fixed sum of money, Debt also lay.[2] Thus it followed that Debt could be brought for the recovery of those fixed sums of money which the defendant was under an obligation enforceable by action of account to pay to the plaintiff. But we shall see that at the end of the sixteenth and in the seventeenth centuries one of the forms of the action of assumpsit—indebitatus assumpsit—was coming to be alternative to the action of debt.[3] It followed that indebitatus assumpsit could be brought for many of those duties arising from implied contracts or quasi-contracts which had formerly been enforced by the actions of debt or account. Therefore it was through this action that the modern law on these subjects grew up. But with this development I cannot deal till I have described the nature of this action of assumpsit, the different forms which it assumed, and the manner in which its sphere was gradually extended, until it supplied that great want of the mediæval common law—an adequate remedy for the enforcement of simple executory contracts.

The Fifteenth, Sixteenth and Seventeenth Centuries

I have already said something of the manner in which the common law doctrines as to liability in tort had been extended and improved by the working of the actions of trespass and deceit on the case.[4] In the course of these extensions of delictual liability it was inevitable that there should be some approach to the confines of the territory of contractual liability. It is quite clear that some torts may be at once torts and, if there has been any agreement between the injured and the injurer, breaches of contract. At the present day the law clearly recognizes that there are certain states of fact which may

[1] Vol. ii 455 and n. 1; and see Y.BB. 41 Ed. III. Pasch. pl. 5; 36 Hy. VI. pl. 5 cited above 426 n. 2.

[2] See the cases cited above 426 n. 2; as Langdale has pointed out, H.L.R. ii 254-256, the two actions did not become concurrent when the amount due was not ascertained, and could only be ascertained by taking an account, see Anon. (1707) 11 Mod. 92, cited at p. 256.

[3] Below 447, 450.

[4] Vol. ii 455-457.

be regarded either as torts or as breaches of contract.[1] At this period there was, of course, the greater temptation to bring such causes of action before the courts as causes of action in tort, seeing that they would not have been actionable at all if they had been sued on simply as breaches of contract.[2] It is from the later years of Edward III.'s reign onwards that cases of this kind begin to be numerous; and it is in these cases, which were treated at first purely as cases of tort, that we can gradually trace the development of our modern theory of contract. The particular kind of action of trespass or deceit on the case[3] which was brought in such cases gradually came to be known as the action of *Assumpsit*; and assumpsit, without ceasing to be used as an action in tort, developed other branches, by means of which contracts expressed and implied, and at length even quasi-contracts, could be enforced. We shall see that it is to the conditions which must be fulfilled for the successful bringing of one or other of the forms of this action that we must look for the conditions which an agreement, other than an agreement under seal, must fulfil before it will be regarded by the law as a contract.

The conversion of the action of assumpsit from a delictual remedy to the chief contractual remedy of the common law can be divided into the following chronological stages:—(1) The original application of the action to remedy misfeasances in breach of an undertaking; (2) its extension to remedy certain kinds of non-feasance in breach of an undertaking; (3) its absorption of the greater part of the sphere of Debt, and its extension to remedy the breach of executory contracts; (4) its extension to remedy the breach of implied contracts.

(1) *The original application of the action to remedy misfeasances in breach of an undertaking.*

In the second half of the fourteenth century the rule was established that a liability in tort arose when one person had

[1] Thomas v. Quatermaine (1889) 18 Q.B.D. *per* Bowen, L.J., at pp. 698, 699; cp. Kelly v. Metropolitan Railway Co. [1895] 1 Q.B. 944; Pollock, Torts chap. xiii.

[2] In the seventeenth and eighteenth centuries the tendency was exactly the reverse, owing to the convenience of the action of assumpsit. In *The Circuiteers: An Eclogue* (see L.Q.R. i 232), "parts of which may now almost serve as a sort of valedictory address to the defunct science of Special Pleading," it is written—

"Thoughts much too deep for tears subdue the court
When I *assumpsit* bring, and god-like waive a tort."

For some difficulties which have arisen in consequence of this practice see below 449-450.

[3] It is a little difficult to define the exact boundaries of trespass and deceit on the case; but generally, as Sir John Salmond says (Essays in Jurisprudence 208), "Trespass was applicable only to the case of damage to the person or property of the plaintiff. But deceit included all cases in which the plaintiff had suffered

caused damage to another by the manner in which he had fulfilled a duty which he had undertaken (*assumpsit*) to perform. This liability was enforced by the special variety of trespass or deceit on the case which came to be known as the action of assumpsit. The original scope of this action can be illustrated from two of the earliest cases on this subject which have got into the books. In the first of these cases the plaintiff complained that the defendant had undertaken (*emprist*) to carry his cattle over the Humber, that the defendant had overloaded his boat, and that in consequence his cattle had perished. The objection that the plaintiff should have brought covenant was overruled, and the court held that overloading the boat and the consequent drowning of the cattle was a trespass.[1] The second case comes from the year 1370.[2] The plaintiff alleged that the defendant undertook (*manucepit*) to cure his horse, and that he did his work so negligently that the horse died. Again the objection that the proper action was covenant was overruled. The gist of the action was held to be the negligence which had caused the death of the horse.[3] In other words, the action sounded in tort and therefore trespass on the case was the appropriate writ. The principle of these cases was well summed up by Newton in 1436.[4] "If a carpenter," he said, "makes a covenant with me to make me a house good and strong and of a certain form, and he makes me a house which is weak and bad and of another form, I shall have an action of trespass on my case. So if a smith makes a covenant with me to shoe my horse well and properly, and he shoes him and lames him, I shall have a good action. So if a doctor takes upon himself to cure me of my diseases, and he gives me medicines, but does not cure me, I shall have action on my case. So if man makes a covenant with me to plough my land in seasonable time, and he ploughs in a time which is not seasonable, I shall have action on my case. And the cause is in all these cases that there is an undertaking and a matter in fact beyond the matter which sounds merely in covenant. . . . In these cases the plaintiffs have suffered a wrong." Similarly deceit upon the case lay where a man expressly warranted a thing sold, and the thing proved to be other than as warranted, to the damage of the plaintiff.[5] "If," said Brian,[6] "a man sells

injury by acting in reliance on the defendant's promise;" obviously on some facts either might lie; see above 385-386.

[1] 22 Ass. pl. 41 f. 94; cp. the Register ff. 105b, 108, 110, 110b.

[2] Y.B. 43 Ed. III. Mich. pl. 38.

[3] *Belknap* said, "Cest accion est prise pur ce que vous fists vostre cure *ita negligenter*, issint que le chival morust."

[4] Y.B. 14 Hy. VI. p. 18; cp. Ames's summary, Lectures 130.

[5] Above 408.

[6] Y.B. 11 Ed. IV. Trin. pl. 10.

me seed and warrants it good, and it is bad, or warrants that it is seed of a certain county, and it is not, I shall have action of deceit." It may be that a vendor who sold goods knowing that he had no title to them was liable without express warranty in action for deceit.[1] But apart from this, unless the vendor was under a public duty by virtue of his calling to warrant the quality of the goods sold,[2] he was not liable in the absence of an express warranty.[3] If the purchaser was deceived it was his own folly.

The principle of these cases was easily extended to other cases in which the defendant had damaged the plaintiff by acts of a fraudulent character contrary to an express undertaking. In the case of *J. Somerton*—a case of the year 1433 which was several times argued[4]—the facts were as follows: the plaintiff had retained the defendant to be his counsel in the negotiations for the purchase of a manor, and had agreed to pay him a fixed sum. The defendant had by collusion become counsel for another, betrayed the secrets of his first employer, and bought the manor for his second employer.[5] There was much discussion as to whether the action lay, and the result does not appear; but there were many opinions expressed which would seem to show that some of the judges thought that it should be decided in the same manner as if the defendant had expressly warranted to the plaintiff that he should have the manor and had not got it for him.[6] The dealing with a third person, after contracting to be of counsel with a certain employer, was, they held, an act which was wrongful because it was contrary to the undertaking involved in a retainer. Therefore it was as much a deceit as the breach of an express undertaking such as a warranty. If there had been a retainer as alleged, and merely a failure to get the manor without any specific positive breach of duty to his first employer, there would have been no cause of action. The case would have been analogous to one in which a man promises certain services or certain things, but makes no warranty as to the result of his services or as to the quality of the things. Martin, J., however, put the case differently and more correctly. A warranty that a man will do a thing is really an independent contract of guarantee. It is quite different to warranties as to a present fact made, e.g. by a vendor as to the quality of his

[1] 42 Ass. pl. 8 f. 259; above 407; Ames, Lectures 137; Y.B. 9 Hy. VI. Mich. pl. 37.
[2] Above 386.
[3] Y.B. 9 Hy. VI. Mich. pl. 37; Y.B. 11 Ed. IV. Trin. pl. 10.
[4] Y.B. 11 Hy. VI. Hil. pl. 10; Pasch. pl. 1; Trin. pl. 26.
[5] See the writ Y.B. 11 Hy. VI. Pasch. pl. 1 (p. 25).
[6] Y.B. 11 Hy. VI. Hil. pl. 10, and Trin. pl. 26 *per* Paston, J.

goods.[1] Nor was this case similar to a promise to act, and a breach of that promise by acting negligently in the attempt to fulfil the promise;[2] for here there was no act done at all in pursuance of the promise. In this case it was either independent parol guarantee or nothing. But no action could be had on such a parol guarantee without deed.[3] Therefore breach of such guarantee gave no ground of action in this case. The only possible ground of action was the wrongful act involved in the fact that the defendant had become counsel for another.[4]

In all these cases of trespass or deceit on the case, the ground of action was a tort pure and simple. The plaintiff sued for a physical injury to his person or property or for a fraudulent injury to his rights caused by some active misconduct on the part of the defendant; and, as Ames says, "the gist of the action being tort not contract, a servant, a wife, or a child who is injured may sue a defendant who was employed by the master, the husband, or the father."[5] It is true that in some of these cases there would have been no liability to compensate for the damage caused if there had not been an undertaking; but it was not the breach of the undertaking which was the ground of the action. The ground of the action was the damage caused by a wrongful act. The fact that the defendant had, in these cases, expressly undertaken not to do acts of that class supplied a reason why the act was wrongful.[6] It did not make the undertaking the ground of the action. As Cotesmore said in *Somerton's Case*,[7] "matter which lies in covenant may by matter arising ex post facto become deceit; for though I employ you to purchase to yourself a manor, and you fail to do so, I shall have no action against you unless the contract is by deed. So if I undertake to pay you £20 without deed and do not do so, you will have no cause of action, for the undertaking sounds in covenant . . . yet when a man who is counsel to one becomes counsel to another, this is a deceit, and changes what was before merely a covenant between the parties into a deceit, for the which deceit he shall have action on his case."

[1] This is clearly explained in Y.B. 11 Ed. IV. Trin. pl. 10, where the principle is accepted as settled law.

[2] Above 430. [3] Above 417.

[4] Y.B. 11 Hy. VI. Hil. pl. 10, "*Newton.*—Il est bon issue pur le defendant a dire que il fist son devoir a luy a purchaser ce manoir solonque le retenir avandit, *sans ceo* que il ad discovre son consail et deviendre de counsail d'un autre. *Paston.*—Nient contristant cest ple il reliera sur vous, entant que il n'est dedit que il garrante a luy a purchaser cest manor; en quel cas il duist luy faire avoir ce. *Martin.*—Il n'aura unques accion de son garrant sans fait; issint c'est le cause de sa accion que il est devenu del counsail ove un autre, etc., et quand cel est traverse, tout que est le cause de son accion per cest maner d'accion est respondu."

[5] Lectures 131. [6] Above 430.

[7] Y.B. 11 Hy. VI. Hil. pl. 10; above 431.

It is clear that many of these cases are capable of being regarded as breaches of contract—we at the present day would think it the most natural way to regard them. As Newton said in *Somerton's Case*,[1] "This is a writ of trespass on the case, but it sounds in a manner in covenant." We have already seen that one of the most usual defences to such actions was the defence that the action was for breach of contract, and therefore should have been brought by writ of covenant.[2] It was not difficult, however, to decide in the class of cases which I have just discussed that an active misfeasance, though it was in breach of an undertaking, was sufficient to give rise to a liability in tort. But the same reasoning, as Cotesmore and Martin pointed out in *Somerton's Case*,[3] does not necessarily apply to a mere non-feasance. If I undertake to act, and omit to act to the damage of the other party, can it be said that I have done anything which will be sufficient to make me liable to an action of trespass or deceit on the case? In Henry IV.'s reign this distinction was clearly seen, and it was held that there was no liability where the damage was caused merely by non-feasance. The report of the earliest of these cases[4] runs as follows: "Laurence Wotton brought a writ on his special case against Thomas Brinth which ran as follows: Whereas the said Thomas had undertaken at Grimsby well and faithfully to rebuild certain houses of the said Laurence within a certain time, nevertheless the said Thomas has neglected to rebuild the houses of the said Laurence within the aforesaid time, to the damage of the said Laurence £10. *Tirwit.*—Sir, you see well how that he has counted of a covenant, and offers no evidence of the covenant—judgment. *Gascoigne.*—Now that you answer nothing we demand judgment and pray our damages. *Tirwit.*—This is simply a covenant. *Bryn.*—So it is; and yet if he had counted, or in the writ mention had been made, that the work had been begun and then by negligence not finished, it would have been otherwise. . . . *Rikhill*, J.—Seeing that you have counted on a covenant and offered no evidence of it, take nothing by your writ and be in mercy." So in another case of the same reign,[5] also an action against a carpenter for failure to build a house, Thirning said, in answer to an argument that an action would lie if he had built badly, "Certainly it would lie in that case, because he would then answer for the wrong which he had done, but when a man makes a covenant,

[1] Y.B. 11 Hy. VI. Trin. pl. 26.
[2] Above 430.
[3] Above 432.
[4] Y.B. 2 Hy. IV. Mich. pl. 9.
[5] Y.B. 11 Hy. IV. Mich. pl. 60.

and does nothing under that covenant, how can you have an action against him without a deed?" Early in Henry VI.'s reign (1425) the opinion of Martin, J., was to the same effect;[1] and in *Somerton's Case* he insisted on the same distinction. "The plaintiff," he said, "will never have an action for breach of the defendant's undertaking to be of counsel with him without a deed: the real ground of his action is that the defendant has become of counsel with another."[2]

(2) *The extension of the action to remedy certain kinds of non-feasance in breach of an undertaking.*

Notwithstanding this strong current of authority, it is clear from certain decisions and dicta that there was a growing inclination among some of Henry VI.'s judges to hold that a mere non-feasance in breach of an undertaking gave a good cause of action in trespass or deceit on the case. The reasons for this inclination were the great inconvenience of the absence of remedy on executory contracts made without deed, and, in the latter part of the period, the fear that litigants might apply to the chancellor to supply this much felt want. In the case already referred to, reported in 1425, some of the judges were evidently inclined to hold that the mere failure to perform an agreement was a good cause of action in trespass on the case;[3] and in 1436[4] Paston and Juyn, JJ., laid the principle down in the broadest of terms. The report runs as follows: "*Paston.*—It is said that if a carpenter takes upon himself to make me a house, and does not do so, I shall have no action upon my case; Sir, I say that I shall. And, Sir, if in your hostelry a smith makes a covenant with me to shoe my horse, and he does not do so, and I move on, and my horse has no shoes, and is injured for want of shoes, I shall have action on my case. And if you who are Serjeant at law take upon yourself to plead my plea, and do not do it, or do it in another manner to that which I have directed, so that I lose, I shall have action on my case. . . . *Juyn.*—Agreed, and as Paston has said, if the smith does not shoe my horse I shall have an action just as much as if he had shode him and lamed him; for all that is dependent upon the agreement and merely accessory to it; and as I have an action upon that which is accessory, I shall have an action on the principal. *Paston.*—That is very well said." It is clear, therefore, that these two judges held that the breach

[1] Y.B. 3 Hy. VI. Hil. pl. 33. [2] Above 432.
[3] Y.B. 3 Hy. VI. Hil. pl. 33 *per* Babington and Cokain, JJ.
[4] Y.B. 14 Hy. VI. pp. 18, 19.

of an undertaking, whether by misfeasance or by non-feasance, was actionable, and that the gist of the action was not a tort, but the damage flowing from the breach of the undertaking.

But this principle was far too large. It meant, as Martin put it, "that one shall have trespass for any breach of covenant in the world."[1] In other words, its acceptance would have made it impossible to distinguish between agreements which the law would enforce and those which it would not enforce. The law would have erred on the side of liberality as much as it had formerly erred on the side of rigidity. No doubt there was urgent need to give protection to some classes of executory contracts; and obviously the existing remedies must be extended in such a way that they should be capable of redressing not only misfeasances, but also some kinds of non-feasances which amounted to breaches of contract. The problem was to find a test which would enable a distinction to be drawn between those agreements the non-performance of which would give ground for an action, and those agreements the non-performance of which would not give ground for an action. The test ultimately reached was obtained by asking whether the damage resulting from the breach of the agreement was caused solely by the breach of the agreement, or whether, in consequence and on the faith of the agreement, the plaintiff had been led to change his position, so that the damage which he suffered was caused not merely by the breach of the agreement, but also by the change of position which the making of the agreement had induced. In the first case mere non-feasance in breach of an agreement was not actionable. In the second case it was. But this general test of the actionability of agreements was only gradually reached. I must now endeavour to trace the steps which led up to it.

We can take as our starting-point a case of the year 1442.[2] A bill of deceit was brought in the King's Bench against one John Doight. The plaintiff counted that he bargained with the said John for the purchase from him of so much land for £100 to him paid, and that the said John had enfeoffed one A of the same land, and had so deceived him. Clearly this was a case in which the damage resulted to the plaintiff from a non-feasance. For, as it was pointed out, to enfeoff a stranger and not to enfeoff the plaintiff was the same thing; and if

[1] Y.B. 3 Hy. VI. Hil. pl. 33; cp. Ames, Lectures 139; as Ames says, it is important in all these cases to note that "covenant" was often used in the sense of agreement.

[2] Y.B. 20 Hy. VI. Trin. pl. 4.

no right of action lay for not enfeoffing the plaintiff, none could lie for enfeoffing a stranger.[1] The defendant was, in fact, at perfect liberty to enfeoff a stranger if the contract was not binding. On the other hand, there were two reasons why mere non-feasance in this case should be held to be actionable. (i) This was a case in which the plaintiff had paid his money and had therefore a moral right to the land. It was just this moral right that the chancellor came to recognize by holding that the vendor in such a case stood seised of the land to the use of the purchaser;[2] and, even if the chancellor was not yet prepared to decide that the vendor held in trust, he was clearly prepared to give relief in equity to persons who had suffered a detriment by acting on the faith of such a promise to convey land.[3] If the common law courts, therefore, were to compete successfully with the Chancery it was in just such a case as this that they ought to supply a remedy. (ii) A kind of reason could be found for granting the action in an application of the law as to the sale of chattels. We have seen that if a man contracted to buy specific chattels for a fixed price, and paid the money, he could bring detinue for the chattels. On the other hand, the vendor who in such a case had handed over the chattels could bring debt for the price.[4] But a purchaser who had contracted to buy land and had paid the price had no such action as detinue for the land. It was argued, therefore, that if in such a case the purchaser had no right of action for damages the law would be grossly unfair; for in the converse case the vendor who had sold the land and conveyed it could clearly bring debt for the price.[5] It was therefore allowed that in such a case deceit on the case lay.[6]

[1] *Ascough*, *arg.*, said, "Entre nostre cas si defendant ust retenu la terre en sa main sans feoffment fait, donques le pleintiff n'aura forsque seulement bref de Covenant; et jeo entend tout un cas quand le defendant fist feoffment a un estranger."

[2] It is not clear that, in the fifteenth century, the chancellor recognized that a bargain and sale transferred the use, Ames, Lectures 239—in Y.B. 21 Hy. VII. Hil. pl. 30 there is a diversity of opinion, and in Y.B. 20 Hy. VII. Mich. pl. 20 the point is treated as open; Bk. iv. Pt. I. c. 2.

[3] Wheler v. Huchynden, Cal. Ch. ii ii; the facts of the case were that the plaintiff, relying on a promise by the defendant to convey land to him, incurred expenses in taking legal advice, and that the defendant had then refused to convey; the date of the case is between 1377 and 1390; see Ames, Lectures 143-144, and references there given to two other cases cited by Mr. S. R. Bird in the *Antiquary* iv 185, and v 38.

[4] Above 355-356.

[5] Y.B. 20 Hy. VI. Trin. pl. 4; it is not distinctly stated in this case what the decision was, but the argument seems to tend in the direction stated in the text, and to go even further; below 438 n. 3.

[6] Y.BB. 2 Hy. VII. Hil. pl. 15; 3 Hy. VII. Mich. pl. 20; it is not stated in these cases that the price was paid when the contract was made; but cp. Y.B.

If we look at the second of these reasons for thus deciding this case from the point of view of the older law, we must allow that it was somewhat specious. The vendor who had sold land and conveyed it could bring debt for the price, not because any contract had been broken, but because the grant of the land was *quid pro quo* for the grant of the money.[1] It is quite true that the purchaser who had contracted to buy land and who had paid the price had no right of action for damages for breach of contract. But, as we have seen, there was no right of action for breach of contract in the converse case. Nor was there any logical injustice in not allowing an action in such a case because there is some authority for saying that a purchaser who had paid for his land, and had not got it, could sue in debt to get back his money.[2] But though we may admit that the decision was, from the point of view of the older law, not strictly logical, it was very reasonable from the point of view of the larger conceptions of contract which were coming to the front; and it was a very necessary decision if the competition of the Chancery was to be successfully met.

Two of the judges (Newton and Prisot, C.JJ.) were prepared to go even further than this, and to hold that a mere contract to sell land at a fixed price (though that price had not been paid) would give to the purchaser a right to sue in case if the land were not conveyed, and the vendor a right to sue in debt if the money were not paid. In other words, they were prepared to hold that a wholly executory contract to sell land was actionable. That there was some tendency to take this view appears probable from the fact that in the Register (described above), which dates from the early years of Henry VI.'s reign, there is a precedent of a writ for beginning such an action.[3] It may be

21 Hy. VII. Mich. pl. 66 where *Fineux*, C.J., says, "Et issint est si on fait bargain ove moy que jeo aura sa terre a moy . . . pur xx *li.* . . . *si jeo pay a luy les xx li.*, si il ne veule faire estat a moy accordant al covenant, jeo aurai Accion sur mon cas, et ne besoigne suit subpœna;" cp. below 439-440 *per* Frowyck, C.J.

[1] Vol. ii 368; above 356, 421-423.

[2] Y.B. 21, 22 Ed. I. (R.S.) 598-600, "*Metingham.*—If a covenant be made between Robert de Hertford and me that he shall enfeoff me of a carucate of land and put me in seisin at Easter in consideration of thirty marks; and Easter comes and he does nothing for me; in that case I may choose whether I will demand the money by writ of Debt, or demand by writ of Covenant that he perform his covenant with me in respect of the land."

[3] Vol. ii App. VE, f. 72b *De messuagio empto:* "Quare cum idem A unum messuagium cum pertinenciis in N de prefato B pro quadam pecunie summa eidem B ad certos terminos solvenda apud N emisset et idem B præfatum A in seisinam messuagii predicti infra certum tempus ponere ibidem assumpsisset predictus B ipsum A in seisinam ejusdem messuagii infra tempus predictum ponere non curavit ad dampnum, etc."; this precedent does not appear in the printed register; on the same page there are two other writs for non-feasance, one for not building, and the other for not repairing a house, after agreeing to do so for a fixed price; in the former case the money is stated to have been paid.

observed that if the common law could have sanctioned this it would have anticipated the equity of the chancellor. For it was not yet clear, even when the money was actually paid, that the chancellor would compel the vendor to hold to the use of the purchaser.[1] But the reasons which were given for this conclusion were clearly illogical. They rested, in fact, upon a misapplied application of the law as to the sale of chattels.[2] If a man agreed to sell chattels for a fixed price the vendor could bring debt for the price, and the purchaser detinue for the chattels. The grant of the price was *quid pro quo* for the grant of the right to possess the chattels. It was assumed that, in the case of land as in the case of chattels, the mere promise to pay the fixed sum could be sued on by action of debt; and it was argued that as the purchaser was liable in debt for the price, he had a clear equitable right to the land; and, as he had no other action (such as covenant or detinue), he must be allowed to sue by this action of deceit on the case.[3] As Ames says, this argument rested on a false premise.[4] No action of debt lay for the price under a mere agreement to sell land, for there was no *quid pro quo*. The reason why debt lay for the vendor in the case of an agreement to sell chattels was the fact that the purchaser could sue in detinue. If the purchaser could bring no such action the proper conclusion to draw was that the vendor had no action of debt for the money.[5] This reasoning is, therefore, as Ames calls it, a departure from strict principle. But I should like to suggest that it is not, as he calls it, merely an "idiosyncrasy" of the judges who adopted it. It was a means of arriving at a decision which was expedient if the common law courts were to retain a jurisdiction which the chancellor might otherwise have absorbed. We must not expect to find all the decisions, still less all the reasons for the decisions, quite logical and consistent at a time when the courts were seeking to find a liberal principle by means of which the enforceability or unenforceability of agreements could

[1] Above 436 n. 2.

[2] Above 355-356.

[3] Y.B. 20 Hy. VI. Trin. pl. 4 *Newton* said, "Quand le pleintif avoit fait plein bargain ove le defendant, maintenant le defendant purra demander ceux deniers per bref de Debt, et en conscience et en droit le pleintiff doit avoir la terre, mesque le propriete ne peut passer en luy par Ley sans livere del seisin. Donc ceo serra merveillous Ley que un bargain serra parfait sur que l'un party serra lie par action de Debte, et que il serra sans remedie envers l'autre; par que l'accion de Deceit gist bien;" we find the same reasoning in Y.BB. 19 Hy. VI. Mich. pl. 47 (p. 24); 22 Hy. VI. Hil. pl. 29; 37 Hy. VI. Mich. pl. 18; above 436.

[4] Lectures 140 n. 3.

[5] This is pointed out by *Fortescue*, in Y.B. 20 Hy. VI. Trin. pl. 4; after admitting that debt lies for the vendor and detinue for the purchaser on a contract to sell a chattel for a fixed price, he says, "Mes n'est issint en notre cas, car mesque le pleintiff ad droit d'avoir celle terre en conscience, uncore la terre ne passe sans livere."

be tested.[1] It is clear that these judges wished to find some principle by means of which they could enforce some purely executory contracts. They hit upon the idea that the test should be the question whether or no the plaintiff had come under some legal liability to the defendant. But this was really an impossible test because it involved a circular argument. Those who used this argument began by assuming a legal liability to be sued in debt which did not exist; and they argued from it to a liability to be sued in case. Whether or not in the fifteenth century the reasoning of these judges was accepted in the special case of a contract to sell land, it is perhaps impossible to say certainly. Most probably it was not.[2] It was not till the following century, and by a somewhat similar chain of reasoning that the law found itself able to effect substantially the object of these judges by distinguishing satisfactorily between the executory contracts which it would and the executory contracts which it would not enforce.[3]

This case, then, which was followed by other similar cases,[4] established the proposition that if A agrees to sell land to B for a sum of money and B pays the money, and A conveys the land to another, B may sue A by an action of deceit on the case. It was no long step to take to say that if, in a similar case, A simply did not convey the land, a similar action would lie;[5] and obviously this reasoning will apply to other contracts besides those for the sale of land. If, then, money was paid in pursuance of any contract, an action on the case lay against the other party if he did not perform his part of the contract. These conclusions follow logically from the case which we have just discussed; but here, again, it is probable that the competition with the Chancery exercised a liberalizing influence.[6] That it was under these conditions that an action on the case lay for nonfeasance we can see from a statement by Frowyck, C.J., in 1504.[7] "If," he says, "I sell you ten acres of my land parcel of my manor and then make a feoffment of my manor, you shall have

[1] Judged by the law as afterwards settled, some of the Chancery decisions at this period go too far in upholding agreements, Ames, Lectures, 144 n. 6.

[2] Above 438 n. 5; the fact that the writ noted above 437 n. 3 does not appear in the printed register supports this conclusion.

[3] Below 444-445. [4] Above 436 n. 6.

[5] Y.B. 21 Hy. VII. Mich. pl. 66, above 436 n. 6.

[6] See Appelgarth v. Sergeantson (1438) 1 Cal. Ch. xli—the facts are curious; the plaintiff alleged that the defendant "sought upon hir to have hir to wyfe, desiring to have of hir certaine golde to the some of xxxvi*li* for costes to bee made of their marriage, and to employ in marchandise to his encrease and profit as to hir husbande;" she trusting him, "nor desiring of him eeny contract of matrymogne," gave him the money; he has married another woman and will not give it up; see also Select Cases in Chancery (S.S.) Nos. 119 (1417-1424) and 128 (1422-1426).

[7] Keilw. 77, 78 pl. 25, cited Ames, Lectures 142 n. 1; see Street, Foundations of Legal Liability ii 33 n.

an action on the case against me, because I received your money, and in that case you have no other remedy against me. And so, if I sell you my land and covenant to enfeoff you and do not, you shall have a good action on the case, and this is adjudged.[1] . . . And if I covenant with a carpenter to build a house, and pay him £20 for the house to be built by a certain day, now I shall have a good action on my case, because of payment of money, and still it sounds only in covenant and without payment of money in this case no remedy, and still if he builds it and misbuilds, action on the case lies. And also for non-feasance, if money paid, case lies."

It was inevitable that, when the law had reached this point, some further generalization should be made of the cases in which an action on the case for non-feasance would lie. Such a generalization was needed, just as in an earlier day the generalization of the conditions under which an action of debt would lie had been needed and ultimately effected by the doctrine of *quid pro quo*. Indeed, as we shall now see, the latest developments in the doctrine of *quid pro quo*[2] probably suggested the generalization effected for the competence of these actions on the case for non-feasance.

As the law stood at the end of the mediæval period the condition precedent for success in an action on the case for damages for non-feasance was the fact that the plaintiff had paid money under the agreement. But should not any other detriment suffered by the plaintiff on the faith of the promise be as good a reason for allowing him to sue in case as the payment of money? It was recognized that this was so in two cases of Henry VIII.'s reign.[3] It was held in those cases that if A said to B, "Supply goods to C, and if he (C) does not pay I will," and B supplied the goods, B could sue A—a decision which, as Ames puts it, "introduced the whole law of parol guarantee."[4] Thus we find it stated in *The Doctor and Student*[5] that "if he to whom the promise is made have a charge by reason of the promise which he hath also performed, then in that case he shall have an action for that thing that was promised, though he that made the promise have no worldly profit by it. As if a man say to another, Heal such a poor man of his disease, or make an highway, and I shall give thee thus much, and if he do it, I think an action lieth at the common law." This was obviously a result very similar to that reached by the decisions that a benefit

[1] Note that he does not actually say here that the money has been paid, but the context makes it reasonably clear that this is meant.

[2] Above 422-423.

[3] Y.BB. 12 Hy. VIII. Mich. pl. 3; 27 Hy. VIII. Mich. pl. 3.

[4] Lectures 143.

[5] II. c. 24; as to this book see Bk. iv Pt. I. c. 4.

conferred on a third person at the defendant's request could be regarded as a *quid pro quo*;[1] and some have thought that this sentence refers to the action of debt.[2] But there is this difference. The doctrine of *quid pro quo* as applied to the action of debt regarded the matter from the point of view of the benefit to the promisor;[3] while in the action of assumpsit the conditions needed for success were, owing to the nature of the action, looked at from the point of view of the detriment to the promisee. As in this passage the emphasis is laid on the "charge," I think it more probably refers to the action of assumpsit.

It would appear from these cases of suretyship and from *The Doctor and Student* that the plaintiff must have incurred "a charge," and that that charge must consist in the fact that the plaintiff had performed his side of the agreement.[4] It is probable that this was partly due to the rule that if the defendant's obligation was to pay a fixed sum of money, the plaintiff must sue in debt.[5] In practice this rule must have worked somewhat as follows: To sue in debt it must be shown that the plaintiff had given a *quid pro quo:* on the other hand, to sue in assumpsit it must be shown that the plaintiff had, as a result of the agreement, undertaken to bear some charge. As to sue in debt performance by the plaintiff must be shown, it was natural and in many cases logical to lay down a similar rule in assumpsit. Thus (to use the example in *The Doctor and Student*) if A promises B that he will pay B £10 if he heals a poor man, B can only sue by action of debt, and he cannot make use of that action till the healing is effected. But, conversely, till A has paid the money it is difficult to see how he has such "a charge" as will entitle him to sue by action of assumpsit. He is not under any "charge" merely in consequence of his agreement with B, for it is quite clear that B cannot sue him by action of debt merely on the agreement to heal. In fact, there are the same objections to making him liable in such a case as applied to the attempt of Newton and Prisot, C.JJ., to enforce an executory contract for the sale of land.[6]

(3) *The absorption by the action of the greater part of the sphere of Debt, and its extension to remedy the breach of executory contracts.*

If the development of the law had stopped at this point many purely executory contracts, certainly all which involved a money

[1] Above 422. [2] Pollock, Contracts (8th ed.) 178 n. (*h*).
[3] Above 423.
[4] Street, op. cit. ii 36—as is there pointed out, though much is said in Sharington v. Strotton (1566) Plowden at p. 302 about actionable assumpsits, "not one of the illustrations there given affords an instance of a contract of mutual promises,"
[5] Above 418 n. 2; and see Ames, Lectures 151 cited below 443.
[6] Above 437-439.

payment on one side, would have been unenforceable. Indeed, looking at the authorities which have just been discussed, it may be doubted whether any wholly executory contract would have been enforceable. All the cases seem to contemplate that plaintiff has either paid money or done some act in pursuance of the contract. That the development of the law did not stop at this point was no doubt largely due to the fact that the constantly expanding jurisdiction of the Chancery was an ever-increasing stimulus to the judges as the sixteenth century drew to a close.[1] And the necessary further development was rendered the more possible by the constant increase in the number of cases in which assumpsit was brought on account of its procedural advantages over debt. It was never forgotten that assumpsit was not based, like debt, upon the grant of a sum of money in return for the grant of property or service, but upon an undertaking the making of which had exposed the plaintiff to "a charge." But, so long as debt, and debt alone, could be brought upon an obligation to pay money, the mere making of the agreement did not in the majority of cases expose either party to a charge unless it had been performed on one side. If, however, assumpsit were allowed to be brought on an agreement to pay money made in return for an agreement to do an act, it is clear that attention will begin to be paid rather to the mutual promises of the parties, which constitute that agreement, than to the performance by one of them; and that the mutual undertakings of the parties, rather than the performance by one of them, will tend to be regarded as the fact which imposes the liability. Performance on one side will no longer be requisite; and thus wholly executory contracts will become enforceable.

In these circumstances it is not surprising to find that the absorption by the action of assumpsit of the greater part of the sphere of the action of debt, and its extension to remedy the breach of executory contracts, were developments which were intimately allied. This fact will be apparent if we look firstly at the lines of cases which resulted in making the sphere of Assumpsit almost coterminous with the sphere of Debt, and secondly at the line of cases which resulted in making it an adequate remedy for the breach of executory contracts.

(i) It would seem that it was about the middle of the sixteenth century that the courts began to allow assumpsit to be brought for a debt, provided that the debtor had, after incurring the debt, expressly promised to pay it.[2] But for some time it

[1] Vol. i 456, 460-461.

[2] "Ou home est endetted a moy et il promes de payer devant Michaelmas jeo puis aver accion de dett sur le contract ou accion del cas sur le promise . . . car

was absolutely necessary that this express promise should have been made after the incurring of the debt. Thus in 1572 Manwood, C.B., objected to a declaration in assumpsit on the ground that the plaintiff "ought to have said *quod postea assumpsit* for if he assumed at the time of the contract then debt lies, and not assumpsit; but if he assumed after the contract, then an action lies upon the *assumpsit*, otherwise not, *quod* Whiddon and Southcote, JJ., with the assent of Catlin, C.J., *concesserunt*." [1] The reason for this limitation is no doubt that assigned by Ames.[2] "The solution of this puzzle must be sought in the nature of the action of debt. A simple contract debt as well as a debt by specialty was originally conceived of, not as a contract in the modern sense of the term, that is, as a promise, but as a grant. . . . Inasmuch as the simple contract debt had been created from time immemorial by a promise or agreement to pay a definite amount of money in exchange for a *quid pro quo*, the courts could not allow an action of assumpsit also upon such a promise or agreement, without admitting that two legal relations, fundamentally distinct, might be produced by one and the same set of words. . . . To them it seemed more natural that the force of the words of agreement was spent in creating the debt. Hence the necessity for a new promise if the creditor desired to charge his debtor in assumpsit."

The further development which allowed assumpsit to be brought upon a debt without this express subsequent promise originated in the court of King's Bench. That court had no jurisdiction to hear actions of debt begun by original writ; but assumpsit, being an action of trespass on the case, fell within its jurisdiction. Naturally therefore it desired to extend the scope of assumpsit, and so it took the obvious step of implying an agreement from the existence of a debt, and allowing assumpsit to be brought on this implied agreement.[3] In 1573, in the case of *Edwards v. Burre*, Wray, J., said that it was the custom of the King's Bench to treat a debt as "an assumption in law," and he expressly contrasted this custom with the opposite custom of the court of Common Pleas.[4] For some time the court of Exchequer Chamber refused to allow the legality of this practice. As late as 1601 it reversed a decision of the King's Bench which

sur le promise ne gist accion de dett," Brooke, Ab. *Action sur le Cas* pl. 5; this remark does not occur in the case which Brooke was abridging, Y.B. 27 Hy. VII. Mich. pl. 3; thus, as Mr. Street says (Foundations of Legal Liability ii 61 n. 1), the principle is probably of later origin; "but as Brooke died in 1558 the date when the point was decided cannot be far from the middle of the century;" as Mr. Street notes, in another case abridged by Brooke in the same title, pl. 105 of 33 Hy. VIII., the principle seems to be admitted.

[1] Anon. Dalison 84 pl. 35.
[2] Lectures 151.
[3] Ibid 146.
[4] Dalison 104 pl. 45.

had treated a debt as "an assumption in law."[1] But in 1602 in *Slade's Case*, after argument before all the judges, the view of the King's Bench was finally upheld.[2] The result was that "Debt as a remedy upon simple contracts practically disappeared, its place being taken by Indebitatus Assumpsit."[3] It practically disappeared, because, from the point of view of the creditor, this new form of action had manifold advantages. Not only was wager of law not possible,[4] but the same preciseness of pleading was not required,[5] and, as we shall see, the action (unlike Debt upon a verbal contract) could be brought against the representative of a deceased person.[6]

(ii) This development which made Indebitatus Assumpsit coterminous with Debt was not in itself a violent departure from that line of cases which had allowed assumpsit to be brought for the non-performance of an undertaking by a person who had changed his position on the faith of the making of the undertaking. In fact this development could be regarded as merely applying the same principle to both of the parties to an undertaking. The earlier line of cases had decided that when money had been paid or other detriment had been incurred on the faith of a promise, assumpsit lay for non-fulfilment of that promise. The later line of cases had decided that when a promise had been fulfilled, so that a debt was incurred, a promise to pay that debt was actionable. But if payment would give rise to an action when the promise on the faith of which the payment was made was not fulfilled; and if the fulfilment of the promise for which payment was expected would give rise to an action on a special promise to pay—why should not any promise be actionable if given for a promise?

The cases would seem to show that it was the growth of Indebitatus Assumpsit, in which the idea of promise was the gist of the action, which brought this idea to the front. The case of

[1] Maylard v. Kester Moore 711.

[2] 4 Co. Rep. 92b; see the passage from ff. 94a, 94b cited below 445; for the similar victory of the King's Bench in Pinchon's Case (1612) 9 Co. Rep. 86b see below 451-452.

[3] Street, op. cit. ii 65.

[4] Above 423.

[5] "The count in Debt must state the quantity and description of goods sold with the details of the price, all the particulars of a loan, the names of the persons to whom money was paid with the amounts of each payment, the names of the person from whom money was received to the use of the plaintiff with the amounts of each receipt, the precise nature and amounts of services rendered. In *Indebitatus Assumpsit*, on the other hand, the debt being laid as an inducement or conveyance to the *assumpsit*, it was not necessary to set forth all the details of the transaction from which it arose. It was enough to allege the general nature of the indebtedness, as for goods sold, money lent, . . . and that the defendant being so indebted promised to pay. This was the origin of the common counts," Ames, Lectures 153-154.

[6] Below 451-452.

Pecke v. Redman (1555)[1] was treated by Coke[2] as a case which decided that a wholly executory contract was enforceable by assumpsit; and, if the case is an authority for this proposition,[3] it is perhaps the earliest case in which this principle was admitted. The remark in argument in the case of *Norwood v. Reed* (1558) that "every contract executory is an assumpsit in itself"[4] shows that the lawyers were beginning to realize that the mutual undertakings—the mutual assumpsits—of the two parties to an executory contract would give rise to mutual actions of assumpsit; and the principle was recognized in 1589 in *Strangborough and Warner's Case.*[5] "Note," it was said, "that a promise against a promise will maintain an action upon the case, as in consideration that you do give to me £10 on such a day, I promise to give you £10 such a day after." This case was quickly followed by other cases in which the same point was adjudged;[6] and it was finally sanctioned and justified by all the judges in *Slade's Case.*[7] "Every contract executory," it was said, "imports in itself an assumpsit, for when one agrees to pay money or to deliver anything thereby he assumes or promises to pay or deliver it, and therefore when one sells any goods to another, and agrees to deliver them at a day to come, and the other in consideration thereof agrees to pay so much money at such a day, both parties may have an action of debt, or an action on the case on assumpsit, for the mutual executory agreement of both parties imports in itself actions upon the case as well as actions of debt." But, as was pointed out in *Nichols v. Raynberd,*[8] both the promises "must be at one instant for else they will be both nuda pacta."

Slade's Case, then, marks the culmination of these two developments of the action of assumpsit which had been going on throughout the sixteenth century; and the terms of the resolution in that case which has just been cited show clearly the interdependence of these two developments. But it should also be noted that the decision owed something to that development of the action of debt which had, in the case of the contract of sale of goods, and in the case of that contract alone, permitted an

[1] Dyer 113a.

[2] Slade's Case (1602) 4 Co. Rep. at f. 94b.

[3] The report in Dyer is not very clear; it is possible that the contract had been partly performed.

[4] Plowden at p. 182.

[5] 4 Leo. 3.

[6] Gower v. Capper (1597) Cro. Eliza. 543; Wickals v. Johns (1600) ibid 703.

[7] (1602) 4 Co. Rep. at ff. 94a, 94b; the only dissentient note was sounded by Vaughan, C.J., in Edgcomb v. Dee (1670) Vaughan's Rep. at p. 101, who called the resolution in that case illegal, and said that "that which is so commonly now received, that every contract executory implies a promise, is a false gloss, thereby to turn actions of debt into actions on the case."

[8] (1615) Hob. 88.

action of debt on an executory contract.[1] Just as that analogy had helped the lawyers to extend the sphere of assumpsit to remedy certain cases of non-feasances in breach of an undertaking,[2] so at a later period it helped them to extend its sphere to remedy the breach of executory contracts. The "infinite precedents" which were shown to Coke to justify the decision of the court appear to have been cases of contracts of sale;[3] and the terms of the resolution show that it was the contract of sale that the judges had in their minds.

But, though these two developments which gave rise to Indebitatus Assumpsit, and to the extension of assumpsit to remedy purely executory contracts, were in their origin interdependent, these two varieties of assumpsit came in time to develop differences which made them distinct forms of action. Thus in 1696 it was held that, though assumpsit lay on an executory contract, Indebitatus Assumpsit only lay when Debt would lie, and could not therefore be brought on a purely executory contract.[4] Special or Express assumpsit thus became distinct from Indebitatus Assumpsit; and, as we shall see immediately, both were distinct from the action in tort grounded on an assumpsit which had been their first parent.

(4) *The extension of the action to remedy the breach of implied contracts.*

The notion of an implied contract figures prominently in *Slade's Case;* and it was a notion which was badly needed to fill up a serious lacuna in the law. The view held by the court of Common Pleas, that Indebitatus Assumpsit only lay when there had been an express subsequent promise to pay, had led to very serious hardship. Thus in 1587, in *Young and Asburnham's Case*[5] it was held, in accordance with mediæval precedents,[6] that, when a man had lodged at an inn without agreeing upon a fixed price for his entertainment, the innkeeper could not bring Debt; and clearly, as no express promise to pay had been made, he could not bring Indebitatus Assumpsit.[7] One of the effects of the decision in *Slade's Case* was to remedy this injustice. In

[1] Above 423. [2] Above 436-439.

[3] The first reason alleged for the decision was "in respect of infinite precedents (which George Kemp Esqr. Secondary of the Prothonotaries of the King's Bench, shewed me) . . . in the reigns of H. 6, E. 4, H. 7 and H. 8, by which it appears that the plaintiffs declared that the defendants, in consideration of a sale to them of certain goods, promised to pay so much money, etc., in which cases the plaintiffs had judgment," 4 Co. Rep. at ff. 93a, 93b.

[4] Bovey v. Castleman 1 Ld. Raym. 69. [5] 3 Leo. 161.

[6] "Et Brian disoit que si jeo port un drape a un taylor de avoir un toge fait, si le price ne soit en certain devant combien jeo payera pur le fesans, il n'avera Det vers moy," Y.B. 12 Ed. IV. Pasch. pl. 22 (p. 9).

[7] Above 443.

1610 in the case of *Warbrooke v. Griffin* it was recognized that the innkeeper could sue for the value of the entertainment which he had provided;[1] and thus was introduced the idea that, when a promise to pay can be implied, assumpsit can be brought on a quantum meruit.[2] This principle was soon accepted; and Shepherd in his book on Actions on the Case cites a case of the year 1632 for the general proposition that, "If one bid me do work for him, and do not promise anything for it; in that case the law implieth the promise, and I may sue for the wages."[3] This principle was easily extended in the course of the seventeenth century to tailors,[4] carriers,[5] factors or bailiffs,[6] vendors of goods,[7] and, in the eighteenth century, to actions by paying sureties against the principal debtor.[8] It was also extended to accounts stated,[9] and to the enforcement of an award by arbitrators ordering one of the parties to the arbitration to do a specific act.[10] In making these logical applications of the principle sanctioned in *Slade's Case* it is probable that the common law courts were influenced, as they had been influenced at earlier periods in the history of this branch of the law, by the fact that the court of Chancery gave a remedy in such cases.[11] In consequence of this action of the courts of common law the interference of equity became unnecessary; and Spence was somewhat at a loss to account for the suits brought to enforce "purely legal demands of a personal nature" which he found on the records of the court in the sixteenth century.[12] As Ames has pointed out the fact that assumpsit could not then be brought on a quantum meruit is a sufficient explanation.

It followed from these cases that assumpsit became a possible remedy in many cases which were formerly only remediable by Debt, Account, or an innominate action on the case. Thus we have seen that it lay on an account stated,[13] and against factors and bailiffs for the payment of ascertained sums of money due from them.[14] But it is the extension of one or other of the forms of assumpsit to some of these innominate actions on the case

[1] 2 Brownlow 254, S.C. Moore 876-877, cited Ames, Lectures 154 n. 4.
[2] Ibid 154.
[3] Cited ibid 154-155.
[4] See the Six Carpenters' Case (1611) 8 Co. Rep. at f. 147a; and cp. Ames, Lectures 154 n. 5.
[5] Nichols v. More (1661) 1 Sid. 36.
[6] Wilkin v. Wilkin (1691) 1 Salk. 9.
[7] Hayward v. Davenport (1697) Comb. 426 *per* Powell, J.
[8] See Ames, Lectures 155-156.
[9] Egles v. Vale (1606) Cro. Jac. 70.
[10] If the award was to pay a sum of money Debt lay; but there was no remedy at common law if the award was to do any other act, see Ames, Lectures 159, citing Tilford v. French (1663) 1 Lev. 113; but at the end of the seventeenth century Holt, C.J., allowed assumpsit to be brought in such a case, Freeman v. Bernard (1698) 1 Ld. Raym. at p. 248.
[11] Ames, Lectures 156.
[12] Equitable Jurisdiction i 693-694.
[13] Above n. 9.
[14] Above n. 6.

against innkeepers, bailees, and carriers which, historically, is, for several reasons, the most interesting.

(i) We have seen that in the Middle Ages the liability of innkeepers, carriers, and others whose callings were of a quasi-public character, for want of skill in the exercise of their callings, was enforced by an action in tort on the custom of the realm. This liability in tort followed from the fact that they were regarded as holding a definite status to which this liability was annexed by law.[1] We have seen also that persons who undertook other trades could also be made liable for misfeasance in breach of their undertaking; and that in these cases the ground of the liability was also tort.[2] But we have seen that it became possible in some of these cases to sue by action of assumpsit on a quantum meruit for breach of their contract express or implied;[3] and we shall see directly that, in the seventeenth century, the bailee who caused damage by acting carelessly could be made liable in Special Assumpsit. The result was that the liabilities of such persons seemed no longer to be founded on tort, but to flow from the contracts which they had made. The adoption therefore of these forms of assumpsit in these cases tended to promote and emphasize a transition from status to contract.

(ii) This development of assumpsit has tended to obscure the nature of the liability of the person who causes damage by the manner in which he has conducted either his trade or any duty which he may have undertaken.[4] As an illustration of this confusion let us take the case of the bailee. In the fifteenth century the bailee who was guilty of negligent misfeasance in breach of his undertaking was liable in an action in tort based on his undertaking.[5] The action sounded in tort, though it was necessary to allege as a ground of this liability that he had undertaken to act, as, without this undertaking, there was no delictual liability.[6] But, in the seventeenth century when negligence had come to be regarded as a ground of liability, it was seen that the liability was really founded on negligence, and that the undertaking was an immaterial detail.[7] Its averment was therefore generally omitted by the plaintiff in actions against

[1] Above 385-386. [2] Ibid. [3] Above 447.

[4] On this subject see Ames, Lectures 131-135.

[5] Ibid 132-133, citing Statham Ab. *Action on Case* (27 Hy. VI.); and Y.BB. 12 Ed. IV. Mich. pl. 10; 2 Hy. VII. Hil. pl. 9.

[6] Above 430; see Ames, Lectures 131-132.

[7] In Mosley v. Fosset (1598) Moore 543 all the judges of the Queen's Bench agreed that "without such an assumpsit the action would not lie;" but in Symons v. Darknoll (1629) Palmer 523 the court held that the action would lie though there was no promise, Whitelock, J., saying that the action "est ex malefacto non ex contracto."

such persons.[1] These actions came therefore to be regarded simply as actions on the case for negligence. But in the sixteenth century several cases had occurred in which it had been sought to make bailees liable in Special Assumpsit—that is, to hold them liable in that form of assumpsit which had assumed the form of a contractual action. But the plaintiffs in these actions failed because they were unable to prove consideration.[2] However, in 1623 it was held that a bailee might be charged in Special Assumpsit on a merely gratuitous bailment,[3] and to justify this step the courts thought it necessary to invent a consideration. According to some of the judges the consideration consisted in the fact that he had received the money and had promised to deliver it;[4] and according to another the fact that the bailee was liable in an action of account and that he was freed from this liability by the bringing of assumpsit, constituted the consideration.[5] The same difficulty was felt in *Coggs v. Bernard*.[6] It was said by Holt, C.J., in that case that "the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management;"[7] and Powell, J., in the same case found a consideration in the fact that "the taking of the goods into his custody is his own act."[8] Still greater difficulties have been found by those who have tried to regard the liability of a gratuitous employé, such as was in issue in the case of *Wilkinson v. Coverdale*,[9] as a contractual liability.[10] The truth

[1] Ames, Lectures 135 n. 6, citing Institutio Clericalis ii 185, and Chitty, Pleading (7th ed.) ii 506, 507.

[2] See Howlet v. Osbourn (1595) Cro. Eliza. 380; Riches v. Bridges (1602) ibid 883, and other cases cited by Ames, Lectures 134 n. 3; in the last cited case the Queen's Bench held that receipt of the property was good consideration for the promise to deliver, but the decision was reversed by the Exchequer Chamber.

[3] Wheatley v. Low (1624) Cro. Jac. 668; S. C. Palmer, 281 sub. nom. Loe's Case.

[4] "Being that he accepted this money to deliver, and promised to deliver it, it is a good consideration to charge him," Cro. Jac. 668.

[5] "Dodderidge dit que (per) le bailment le bailee fuit subject al accompt, qui est discharge et freed par cest action, que est sufficient consideration," Palmer at p. 282.

[6] (1704) 2 Ld. Raym. 909.

[7] Ibid at p. 919; see Markby, Elements of Law (3rd ed.) 313 for some very apposite remarks on this "bold discovery" of a consideration.

[8] Ibid at p. 911.

[9] (1793) 1 Esp. 75; see Sir F. Pollock's remarks on this case in 53 Rev. Rep. Preface.

[10] Thus Anson says, Contracts (14th ed.) 109, that "the liability was stated to arise on the promise, and was disputed on the ground that there was no consideration for the promise. It was therefore based on contract;" but the form of the action was Case, not Assumpsit; and though Lord Kenyon, C.J., started an objection as to want of consideration, on it being pointed out that the action was an action on the case for negligence, he admitted that the objection was misplaced and allowed the action to proceed; no doubt it was the alleged promise to the plaintiff which created the duty to get the insurance policy in a certain form, just as it was the undertaking to a plaintiff by a person professing a particular trade which created the

is that all these cases are really cases of delictual liability disguised by the form of the action. The whole difficulty arises from the fact that the courts allowed a cause of action founded on tort to masquerade as an action founded on contract. The parties were allowed to waive the tort and sue in contract, just as in cases of wrongs to property they were sometimes allowed to waive the trespass and sue in trover.[1] But in the latter class of cases defences like the jus tertii, which were not allowed to a defendant in Trespass, were not allowed if Trover was used merely as an alternative to trespass.[2] It would have removed much confusion if, in these cases of assumpsit against bailees, the courts had refused to allow the defence of want of consideration on the ground that assumpsit was merely alternative to Case, in which form of action no such defence was available.[3]

(iii) We shall see in a later volume that the fact that the liability of carriers and other bailees tended, by reason of these extensions of assumpsit, to be regarded as contractual in its nature, helped to mitigate some of the severe rules as to the nature of their liability which were laid down by the mediæval common law.[4]

It is clear that this last extension of the sphere of assumpsit brings us close to the border line of the sphere of contract. We have seen that Debt or Account lay, not only in certain cases in which there had been an implied consent, but also in cases in which there had been no consent at all.[5] They lay, in other words, for the breach of certain quasi-contractual obligations. It was inevitable that Indebitatus Assumpsit should be extended also to these obligations. But this was a more violent extension than any of the others, because Indebitatus Assumpsit pre-supposed some sort of agreement express or implied. In fact we shall see that Holt, C.J., objected on this ground to this extension ;[6] and as it was not suggested till the end of the seventeenth nor finally sanctioned till the beginning of the eighteenth century, I shall deal with it in the following Book.[7] We shall see that the effects upon legal

duty not to hurt the plaintiff by the way in which he exercised his trade in pursuance of his undertaking, above 386, 430; but in both cases it was not the undertaking, but the negligence which was the gist of the action.

[1] Bk. iv Pt. II. c. 2 § 1. [2] Ibid.

[3] Ley, C.J., seemed to have had some perception of this fact, for he said in Wheatley v. Low, Palmer at p. 282, "comment ne fuit consideration ou assumpsit, uncore le detainer del argent est damage al plaintiff, sur que il poet avoir action ; et non assumpsit n'est proper issue icy, mes nient culp"—in other words, the rights of the parties must be regulated in an action of assumpsit brought on these facts as if they had brought an action on the case.

[4] Bk. iv Pt. II. c. 5 § 6. [5] Above 425-426.

[6] Mayor of York v. Towne (1700) 1 Ld. Raym. 502; Bk. iv Pt. II. c. 3 § 3.

[7] Bk. iv Pt. II. c. 3 § 3.

development of the extensions of the scope of the action which have just been described and of this last extension have not been dissimilar; for just as the main principles of the law as to express and implied contracts were evolved in and through the earlier extensions of the action, so the main principals of the modern law as to quasi-contracts were evolved in and through this last extension.

It was *Slade's Case* which fixed the character of the action of assumpsit; for, as we have seen, it enabled it to absorb the greater part of the sphere occupied by the action of debt, and to become a remedy for the breach of purely executory contracts. From henceforward it was the contractual action of the common law; and the fact that its character was thus fixed is shown by the settlement nine years later of the much debated question whether the representatives of a deceased person could be made liable in an action of assumpsit for the contracts of the deceased; or whether they could escape from liability, either on the ground that, as they were not liable in an action of debt in which a testator might have waged his law,[1] they ought not to be made liable in assumpsit, or on the ground that assumpsit was an action to which the maxim *actio personalis moritur cum persona* applied.[2] This had been a doubtful question during the sixteenth century. In 1521 Fineux, C.J., had decided that the maxim *actio personalis, etc.*, did not apply and that the executors were liable.[3] But in 1536 Fitzherbert dissented vigorously from this decision;[4] and his view was upheld in 1546.[5] However, in 1558, in the case of *Norwood v. Read*[6] the court reverted to the view of Fineux, C.J. But apparently in this case the bearing of the maxim *actio personalis, etc.*, was not considered. The view taken seems to have been that the reason why the representatives were not liable in an action of debt was the fact that, if such an action had been brought against the deceased, he could have waged his law; and that, as wager of law was not possible in an action of assumpsit, there was no reason why they should not be liable. But though the Queen's Bench held the view that the executor could be made liable, in 1595[7] and 1596[8] their decisions to that effect were reversed in the Exchequer Chamber. It was not till 1612 that the view of the King's Bench upon this question prevailed, as it had prevailed in

[1] Above 423.

[2] For the history of this maxim see below 576-582, 584; a very clear account of the development of the law on this matter will be found in Goffin, the Testamentary Executor 58-63.

[3] Y.B. 12 Hy. VIII. Mich. pl. 3 (p. 11).

[4] Y.B. 27 Hy. VIII. Trin. pl. 21. [5] Brook, N.C. 5. [6] Plowden 181.

[7] Stubbings v. Rotheran, Cro. Eliza. 454.

[8] Serle v. Rosse, Cro. Eliza. 459.

Slade's Case,[1] on other questions relative to the competence of assumpsit. In *Pinchon's Case*[2] the court held that the action lay against the representatives, not only on the ground taken in *Norwood v. Read*, but also on the ground that assumpsit was as clearly a contractual action as the action of covenant.[3] It was no longer an action to get damages for a tort, but an action to obtain redress for the breach of a contract. In other words, it enforced the payment of the deceased's debts and gave damages for non-performance of his contractual liabilities; and, as the court said, "It is more consonant to justice and common right that the just debts should be paid than the executors, who have the goods in another's right, should convert the goods to their private uses without paying the testator's debts."[4] It was held shortly afterwards, in spite of some divergence of judicial opinion, that this reasoning applied not only when assumpsit was brought to enforce payment of a debt, but also when it was brought to get damages for the breach of any other contract.[5]

It was not long before other consequences of the contractual character which the action had now assumed appeared. Damages came to be assessed, not upon the delictual principle of compensating the plaintiff for the detriment he had incurred, but upon the contractual principle of compensating the plaintiff for the failure to obtain that which had been promised to him.[6] The special conditions which must be present before the action could be brought—conditions summed up in the word "consideration"—were not the same as the conditions which were necessary to support an ordinary action in tort based upon the active or negligent misconduct of the defendant.[7] It is true that the action did not cease to be capable of being put to its original use of an action in tort.[8] It is true that, even when it was used as a purely contractual action, it did not loose all traces of its delictual origin. In fact the ordinary form of the declaration in assumpsit vividly recalled them.[9] But pleading forms are long-lived things, and

[1] Above 444, 445.

[2] 9 Co. Rep. 86b.

[3] "An action *sur assumpsit* upon good consideration, without specialty to do a thing, is no more personal, i.e. annexed to the person, than a covenant by specialty to do the same thing," ibid at f. 89a.

[4] Ibid at f. 90a.

[5] Sanders v. Esterby (1616) Cro. Jac. 417; Clark v. Thomson (1621) ibid 571; Fawcet v. Charter (1623) ibid 662.

[6] Slade's Case (1602) 4 Co. Rep. at f. 94b; cp. Salmond, Essays in Jurisprudence 212.

[7] For the history of consideration see Bk. iv Pt. II. c. 3 § 1.

[8] Above 448-450.

[9] See Herne's Pleader (ed. 1657) p. 130, "Notwithstanding, the said defendant his promise and assumption little regarding, but meaning and intending him the said plaintiff *craftily and subtilly to deceive and defraud*, the said £9 10s. (the price of goods sold) according to his promise and assumption aforesaid to the said plaintiff has not yet paid or any wayes contented;" and this phrasing continued to the end, see the precedent in Stephen, Pleading (1st ed.) 48.

often represent a past stage in legal history. In all its essential characteristics assumpsit was established as an independent contractual action by the end of the first decade of the seventeenth century.

It has been necessary in tracing the history of assumpsit to pass far beyond the mediæval period. Its history has been so continuous that it hardly admits of a chronological division; and a clear understanding of its whole course, and of the relation of this action to the older personal actions, is necessary to the proper understanding of many of those doctrines of the substantive law of contract with which I shall deal in the following Book. Even at the end of the mediæval period, and still more at the end of the sixteenth century, it had become clear that the common law had obtained a very flexible form of action by means of which many various agreements could be enforced if the plaintiff could show that he had made a counter-promise, or had incurred a detriment on the faith of the defendant's promise. During the mediæval period the law cannot as yet be stated in this general form, nor has the word "consideration" yet been applied to express the conditions under which a plaintiff can succeed in this action. But the roots of this doctrine are firmly fixed in the law, and the appearance of the doctrine itself is not far off. When it appears we shall be able to say that by means of a series of developments in the law of actions the common law has won its way to a wholly original test of the enforceability of agreements—the test of consideration.

The earlier part of this period is marked by the presence of several competing forms of action which, under different circumstances, supplied more or less partially, and more or less indirectly, a remedy for breach of contract. The cases in which Account, Covenant, Debt, and Assumpsit lay might have been separately generalized and reduced to rule, and, as a consequence, we might have had a list of distinct species of contracts, but no general theory of contract as a whole. That the common law was saved from this fate is due mainly to three causes. (i) The competition for business among the common law courts, and especially the competition which, at the end of the period, sprang up between the common law courts and the Chancery, helped to extend those actions which offered the best remedies. (ii) The various forms of action were consequently so extended that they were always tending to overlap one another, and, as we have seen, they were allowed to become in many cases concurrent.[1]

[1] Vol. ii 455 n. 1; above 428, 442-444, 447.

(iii) The action of assumpsit offered such advantages to the litigant, both in its freedom from old technical restrictions and in its capacity for expansion, that it soon showed signs of covering the whole or almost the whole field of the older actions;[1] and thus the theory of contract developed in the action of assumpsit became the theory of the common law. It was largely due to the fact that the common law had come by this reasonable and flexible theory of contract that this branch of the law was able to extend its borders at the expense both of the law of property and the law of persons. In the law of property much of that miscellaneous mass of incorporeal things, which, as we have seen, is a peculiar characteristic of the law of the earlier Middle Ages, disappeared, because men found that they could effect their objects more easily by making a contract than by conveying a *res*. In the law of persons special contracts came to regulate many of the duties involved in those professions and callings which, in the mediæval period, seemed to rest rather upon a status determined by law than upon the agreement of those who required the services of such persons. In this country the action of assumpsit must be reckoned a technical instrument which gave no small help to the forces which were making for the transition from status to contract. To the mediæval law of status we must now turn.

[1] Thus it is said in *The Doctor and Student*, Bk. II c. 24, "It is not much argued in the Laws of England what diversite is between a contract, a concord, a promise, a gift, a loan, or a pledge, a bargain, a covenant, or such other. For the intent of the law is to have the effect of the matter argued and not the terms."

CHAPTER IV

STATUS

MAINE'S famous dictum that "the movement of progressive societies has hitherto been a movement from status to contract,"[1] is a generalization from the historical development of institutions and rules which originated in the patriarchal family. It is applied by Maine only to that department of law which mature legal systems style private law, and chiefly to that department of private law which comprehends those topics which the Roman institutional writers grouped under the rubric "law of persons."[2] If we except those forms of status due to youth or mental incapacity, which must necessarily be found in all legal systems at all stages of their development, the dictum is in this department of private law very largely true. Thus, in Roman law, if we compare the status of the filius-familias or the married woman in the early days of Roman law with their status under Justinian; and if we look at the elimination of the status of mancipium, and the gradual assimilation of the class of libertini to that of ingenui, we see instances of the operation of this principle. Similarly, we can see it in operation in English law if we look at the history of the status of the villein and the married woman. But we must not give the dictum a greater extension than its author intended. In particular we must note that it has never had any direct application in the sphere of public or semi-public law. On the contrary, the growth in progressive societies of the complexity both of the state and of social, commercial, and industrial relations has led to the growth of new varieties of status. Under the later Roman Empire the soldier and the civil servant occupied a far more definitely defined status than in primitive society; and under

[1] Ancient Law 170; cp. Pollock's comment L.Q.R. xxi 291-293; he suggests that the dictum should be "limited to the law of property taking that term in its widest sense as inclusive of whatever has a value measurable in exchange."

[2] "All the forms of Status taken notice of in the Law of Persons were derived from, and to some extent are still coloured by, the powers and privileges anciently residing in the Family. If then we employ Status . . . to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of progressive societies has hitherto been a movement from Status to Contract," loc. cit.

the early empire one of the effects of the change in the character of slavery produced by the foreign conquests of Rome was the statutory creation of the status of the Latini Juniani and the Dedditicii. Under all modern systems of law the soldier, and under most continental systems of law the civil servant, occupy a status unknown to early systems of law; and the growth of corporations has added a new population of artificial persons to all modern states. Religion, too, has at all times claimed for its priests a special status; and this special status of priests, and the still more special status of those who occupy the higher ranks in religious hierarchies, have been, both in ancient and in modern societies, perhaps the most enduring of all forms of status. No doubt the decay of certain forms of status, and the appropriation of the sphere which they once occupied by the law of contract is the mark of certain progressive societies. But new forms of status have been constantly arising and it is the fact that the societies in which they have arisen are progressive societies that is the cause and occasion for their creation.

The law of persons or status in the mediæval common law is complex; and the cause of its complexity is the same as the cause for the complexity of many other branches of that law. We have seen that the customary basis of the mediæval common law often led to the retention by it of many primitive ideas; and some of these primitive ideas may have helped to perpetuate old rules as to the legal position of infants and their guardians, of married women, and of many of those humbler persons which went to make up the class of villeins. On the other hand, neither the English state nor the common law was the product of purely primitive custom. Ideas drawn from the civil and canon law had helped to mould both; and the fact that the English state, like the other states of Western Europe, was part of the Holy Roman Empire and recognized the authority of the Pope, gave to all ecclesiastics a definite status, and secured recognition for the many different forms of status which existed under the law of the church. Thus we have not only forms of status which are characteristic of a primitive society, but also forms of status, corporate status for instance, which were called into existence by the new needs of a progressive society; and forms of status, the status of the king for instance, which are the product of both the primitive and the more advanced ideas. No doubt the growing supremacy of the common law made for the obliteration of the lines of division between status and status; and it has always been an arguable question at what point so few differences are left that the status disappears. In the mediæval common law, for instance, the growing uniformity of the criminal

law caused the difference between free and villein from some points of view to disappear;[1] but no one would deny that the villein occupied a definite status. On the other hand, the tendency of the common law to absorb the jurisdiction of the older commercial courts leaves it a debatable point whether or not we should assign a definite status to the mediæval merchant.[2]

But debates as to whether this or that class occupies a definite status are apt to degenerate into barren controversies over terminology. Whether we give this or that class a special status it is, I think, clear that in the Middle Ages there were a number of persons who occupied a special position of their own. We should perhaps be guilty of an anachronism if we called them abnormal persons; for it may be doubted whether early law recognizes such a thing as a normal person. It recognizes rather various ranks and groups and classes, each occupying its own legal position in a loosely organized society.[3] The very idea of a normal person is the creation of a common law which has strengthened the bonds of this society by administering an equal justice to all its members. All through this period the mediæval common law was creating the idea of the normal person—the free and lawful man of English law.[4] But all the time primitive ideas, religious beliefs and ecclesiastical law, political legal and commercial necessities, and social differences, combined to produce large and variegated classes of persons who, to a greater or a lesser extent, departed from this norm.

The truth of this will be apparent if we enumerate some of the "sorts and conditions" of men whom Maitland has described in the History of English law,[5] and glance at one or two other classes of persons who occupied a special status of their own. We have the forms of status created by permanent physical facts —the infant[6] and the lunatic,[7] to whom in mediæval days we should add the leper.[8] Primitive ideas helped to create the status of the married woman[9] and the villein,[10] and perhaps to deny the woman any place in public law.[11] Religious beliefs

[1] Below 493-494.

[2] See P. and M. i 449-450, where the opinion is expressed that neither in public nor in private law can the merchant be said to have a special status.

[3] See vol. ii 464-465.

[4] Speaking of the thirteenth century Maitland says, "Among laymen the time has indeed already come when men of one sort, free and lawful men (*liberi et legales homines*) can be treated as men of the common, the ordinary, we may perhaps say the normal sort, while men of all other sorts enjoy privileges or are subject to disabilities which can be called exceptional," P. and M. i 390.

[5] Bk. II chap. ii.

[6] Below 510-520.

[7] Vol. i 473-476.

[8] P. and M. i 463.

[9] Below 520-533.

[10] Below 491-510.

[11] P. and M. i 465.

and ecclesiastical law gave to priests a special status;[1] and to the monk, who was treated as legally dead, a status, or rather absence of status, still more special.[2] We shall see, too, that ecclesiastical law had no small influence in introducing into English law the idea of the corporate person.[3] Both religious and political ideas helped to create the peculiar status of the Jew;[4] and political needs tended gradually to define the position of the alien.[5] We shall see that both political and legal ideas helped to give the king his very peculiar status in English law.[6] The legal sanctions applied by the common law to enforce its rules, adjective and substantive, gave rise to the status of the outlaw and person attainted,[7] and those applied by the ecclesiastical law to the status of the excommunicate.[8] Political needs in the sphere of local government helped to develop and turn to secular uses the ecclesiastical idea of the corporate person;[9] and commercial needs will soon begin to take an even more important share in this work.[10] Lastly, social and, to a small extent, legal differences tended to make the position of the peer very distinct from that of the commoner;[11] and the position of the trader to some extent different from other members of the community.[12]

It is unnecessary at this point to describe all these many classes of persons who occupied a more or less special status. Of the lunatic, the Jew, and the excommunicate, the peer, and the merchant, I have already said something in a former volume of this History; and of the merchant, the ordinary subject, and the alien, I shall speak in later volumes. At this point I shall deal with the King; the Incorporate Person; The Villein; the Infant; and the Married Woman.

§ 1. The King

The position which the king and his prerogative hold in the full-grown common law is well summarized in Blackstone's Commentaries.[13] Beginning with the statement that the king is subject to law, Blackstone proceeds to distinguish between his direct and his incidental prerogatives. The direct prerogatives "are such positive substantial parts of the royal

[1] P. and M. i 422-440; for the benefit of clergy see above 294-302.
[2] Ibid 416-421.
[3] Below 470, 474-475.
[4] Vol. i 45-46; P. and M. i 451-458.
[5] P. and M. i 441-449; Bk. iv Pt. II. c. 6 § 3.
[6] Below 460-469.
[7] P. and M. i 459-461.
[8] Vol. i 631; P. and M. i 461-463.
[9] Below 474-475.
[10] Bk. iv. Pt. II. c. 6 § 2.
[11] Vol. i 357-358; P. and M. i 391-394.
[12] Vol. i 526-544.
[13] i 231 seqq.

character and authority as are rooted in and spring from the king's political person." By virtue of these prerogatives he is personally sovereign, and has the pre-eminence over all within his realm; he can do no wrong; he can never die; he is the representative of the state in its dealings with foreign nations; he is a part of the legislature; the head of the army; the fountain of justice, always present in all his courts; the fountain of honour; the arbiter of commerce; the head of the church. The incidental prerogatives are, so Blackstone tells us, "only exceptions in favour of the crown to those general rules that are established for the rest of the community." Instances are the rules that no costs shall be recovered against the king, that he cannot be a joint tenant, that a debt due to him is preferred. We could have no better illustration of the gradual way in which both the English constitution and the common law have been built up than these doctrines as to the meaning and extent of the king's prerogative. In fact, the prerogative is the oldest part of the constitution, and the law which centres round it bears upon it the marks of all the varied phases through which the constitution has passed. It is this fact which gives to it its "peculiar import," and makes it impossible to define it completely "by any theory of executive functions."[1]

Taking a broad view of our legal and constitutional history, we can see three distinct periods in its development. (1) During the mediæval period the king was regarded quite as much as a superior feudal lord with special privileges as a ruler entrusted with the executive powers of the state. It is for this reason that the doctrines as to those prerogatives which Blackstone calls "incidental" were then elaborated. (2) It is to the lawyers of the sixteenth and early seventeenth centuries that we owe those attributes of perfection and immortality with which the law still invests the king. They gave him a politic capacity, and they emphasized his powers in such a way that, through his prerogative, he was able to act as the executive of a modern state. What Blackstone calls the direct prerogatives of the crown were given their modern shape by lawyers who based their theories upon the achievements of the Tudor dynasty. (3) In the seventeenth century the controversy as to the relation of the prerogative to the law was fought out and decided. The events of that century decided that the prerogative was subject to law; and Blackstone prefaces his account of it by a clear statement to this effect. In this section we are concerned only with the mediæval period and its influence upon the subsequent law.

[1] Hallam, Middle Ages iii 148.

In this period the prerogative has, so, to speak, a double aspect. The king is the head and the representative of the English state in a truer sense, perhaps, than any other ruler in Europe could claim to be the head and representative of his state. The strong centralized government which had given England a common law gave the king this position. But, for all that, men's legal and political ideas were cast in a feudal mould. Legal theories were necessarily influenced by these ideas. They have exercised, as we have seen, an enduring influence upon the land law, and they had some effect upon the law of treason. They exercised at this period a large influence upon the view which the law took of the king and his prerogative. I shall, therefore, say something, firstly, of the feudal ideas which coloured men's conception of the prerogative at this period, and, secondly, of the national ideas.

The Feudal Ideas

The organization of the average manor was the organization of the kingdom in little.[1] The king was very like a feudal lord writ large. His powers were the powers of other feudal lords magnified. "He has hardly a power," says Maitland, "for which an analogy cannot be found elsewhere."[2] It is from this point of view that the prerogative is defined as libertas or privilegium regis—as "exceptions in favour of the crown to those general rules that are established for the rest of the community."[3] The contents of the so-called statute Prærogativa Regis are a good illustration of this conception of the prerogative.[4] According to its sixteen chapters it consists of slightly exaggerated feudal privileges. Certain procedural privileges were gradually added in this period;[5] and when in 1548 Sir William Staunford compiled his exposition of the king's prerogative from the Year Books he followed the chapters of the statute, merely adding an account of the legal process which could be used by or against the crown. Staunford, indeed, did not forget that this exposition did not exhaust the subject.[6] Already in his day these feudal

[1] See Vinogradoff, Villeinage 324, 325.

[2] P. and M. i 497.

[3] Co. Litt. f. 90b; above 459.

[4] For this statute see vol. ii 223 n. 1; vol. i 473 n. 8. The matters dealt with are wardship, marriage, primer seisin, dower, fines for alienation, advowsons, idiots, lunatics, wreck, the lands of Normans, intrusion of the heirs of tenants in chief into their lands before they have done homage to the king and got seisin from him, escheats of the lands of a bishop's tenants while the see is vacant, interpretation of the king's grants, the lands of felons attainted.

[5] See e.g. Y.BB. 8 Ed. II. (S.S.) 180 *per* Scrope *arg.*; 12, 13 Ed. III. (R.S) 332; Bacon's argument in the case *De Rege Inconsulto*, Works, vii 681; for the history of the subject's remedies against the crown, see Bk. iv Pt. II. c. 6 § 1.

[6] "Divers other Prerogatives there bee, whiche the king hath by the order of the common lawe that bee not within this statute comprised."

privileges of the crown were sinking into the background. They were becoming merely the "incidental" prerogatives of the crown—the ordinary private rights of the crown as contrasted with the sovereign position it held or claimed to hold in public law. It may be said, too, that an exposition of the prerogative derived from reported cases will always tend to exaggerate these incidental prerogatives, because it is chiefly about them that there is argument in the law courts;[1] and that the lawyers, because they know more about them, may forget to attach due weight to the more important prerogatives which make the king the head of the state. We could imagine a royalist lawyer and statesman like Bacon levelling this charge against a parliamentary lawyer like Coke; and we should be obliged to admit that it contained an element of truth. But, though in later days these feudal privileges of the king were matters of very small account, and formed but a small part of the sum total of the prerogative, we cannot in this period disregard either the ideas which underlay them or the consequences which flowed from them. That these ideas had then an important effect upon the powers and position of the king there are many proofs.

Allegiance was due to the king from his subjects, just as homage and fealty were due from a tenant to his feudal lord. It is true that an English king could insist upon an oath of allegiance from all his subjects, whosesoever men they were. It is true that in later law many deductions as to the subject's position in relation to the crown were drawn from the nature and consequences of allegiance.[2] But these deductions were not drawn in this period; and the idea that allegiance constituted a mutual tie to which either party could put an end leaves its traces even in English history. Though in 1213 Stephen Langton had argued that the king could not wage war against his barons without the judgment of his court,[3] this did not negative the right of either king or subject to get rid of the tie of allegiance. In 1215 the barons gave a solemn notice (*diffidatio*) that they had renounced their allegiance;[4] and Henry III. sent Richard, the Earl Marshal, a formal diffidation before he marched against him—a step which in the opinion of the earl legalized his resistance to the king.[5] If, in fact, this solemn notice that allegiance had been renounced was given, the levying of war against the king was probably not treason till Edward III.'s statute.[6] Even

[1] As Bacon said in the case of the *Postnati* (Works vii 646), "Although the king in his person be solutus legibus, yet his acts and grants are limited by law, and we argue them every day."

[2] See Bk. iv Pt. II. c. 6 § 3.

[3] McKechnie, Magna Carta 29.

[4] Ibid 34; and see Adams, Origin of the English Constitution 181 n.

[5] Matthew Paris (R.S.) iii 249, 258.

[6] P. and M. ii 503-505; above 288.

under that statute a conspiracy to levy war was no treason. When Edward II. and Richard II. were deposed, there were no such theoretical difficulties as were felt in 1688. In the first case, Sir William Trussell, as proxy for the lords spiritual and temporal and others, renounced their allegiance: in the second case, Richard released his subjects from their allegiance.[1] We are not surprised to find that the feudal tie between lord and man was often found to be stronger than the national tie between king and subject. The men of his earldom of Chester supported Richard II. to the last. The duchy of Lancaster always afforded a refuge for Henry VI.[2]

The idea which in later law appears in the form of the maxim that the king can do no wrong is in this period simply the application of the ordinary rule that a lord cannot be sued in his own court.[3] The king has not always been the sole fountain of justice. Statutes were needed in Richard II.'s reign to stop an attempt to create a new form of private jurisdiction.[4] We have seen that in Henry VI.'s reign the whole apparatus of local government was controlled by a turbulent baronage; and that the livery of a great lord was often a better protection than the king's peace.

Perhaps the most important influence of these feudal ideas may be found in the confusion between proprietary rights and governmental rights which was fostered by them. Feudalism is, as we have seen, both a system of property law and a system of government.[5] Political rights and privileges were regarded as property; and the king's political rights and privileges—his prerogative—did not escape the influence of this idea. The descent of the kingdom itself is regulated by much the same law as the descent of an estate,[6] and, as we have seen, the descent of the kingdom had in Henry III.'s reign a very direct bearing upon the law of inheritance.[7] The king can sell privileges and franchises, just as he can sell or give away the royal demesne. No distinction is drawn between the king's private property and the property which he holds in the right of his crown.[8] That the king should

[1] "Ego Willielmus Trussell, vice omnium de terra Angliæ et totius parliamenti procurator, tibi Edwardo reddo homagium prius tibi factum, et extunc diffido te et privo omni potestate regia et dignitate, nequaquam tibi de cætero pariturus," (Knighton (R.S.) i 441. "Ego Ricardus omnes archiepiscopos, etc. . . . et ligeos homines meos quoscunque . . . a juramento fidelitatis et homagii, et aliis quibuscunque mihi factis, omnique vinculo ligeantiæ ac regaliæ ac dominii quibus mihi obligati fuerunt vel sint, vel alias quomodo libet astricti, absolvo," R.P. iii 416, 417 (1 Hy. IV. nos 10-14); both passages are cited by Allen, Prerogative note P.

[2] Stubbs, C.H. iii 551, 552.

[3] Below 465-466.

[4] Vol. i 178 n. 8.

[5] Ibid 17-18.

[6] P. and M. i 497-499.

[7] Above 175.

[8] P. and M. i 502. We see perhaps an attempt to distinguish them in Edward III.'s will, see P. and M. i 506 n. 2; and Henry V., though he could clearly leave his property by his will, was unable, so Parliament decided, to bequeath the kingdom, R.P. iv 326; Nicholas iii xii, xiii; but we can see that the distinction is not carried

"live of his own" was the ideal of mediæval Parliaments. That meant that the king's household should be maintained from the royal estates; and of the king's household all the servants of central government were members.

In this period these feudal ideas, though they left the king free to use his property and his prerogatives as he pleased, yet helped to weaken his position by depriving him of any peculiar sanctity. Moreover, as we shall now see, they affected what I have called the national idea of his prerogative.

The National Ideas

Something has already been said of the position of the king in his capacity of the fountain of justice, and head and representative of the state. We have seen that Bracton strongly emphasized these attributes of the prerogative.[1] We have seen, too, that the king's prerogative was regarded as subject to law, and subject in some respects to the control of Parliament; but that the problems involved in his relations to the law and to Parliament were never really faced in this period.[2] But, in spite of the high position thus assigned by the law to the king, the law never regarded him as being anything else than a natural man. "The mediæval king," says Maitland,[3] "was every inch a king, but just for this reason he was every inch a man and you did not talk nonsense about him. You did not ascribe to him immortality or ubiquity, or such powers as no mortal can wield. If you said that he was Christ's Vicar, you meant what you said, and you might add that he would become the servant of the devil if he declined towards tyranny. . . . In all the Year Books I have seen very little said of him that was not meant to be strictly and literally true of a man, of an Edward or a Henry." This manner of looking at the king has some very important effects upon the manner in which the law regards his prerogatives. It prevents at once the attribution to the king of those "transcendent qualities" with which the lawyers of a later age invested him. Let us look at some of its results.

The king can die and his peace expires with him. A well-known passage in the Anglo-Saxon Chronicle tells us that, on the death of Henry I., "there was tribulation soon in the land, for every man that could forthwith robbed another."[4] On the death of Henry III., Edward I.'s peace was sworn on the following day, and he began his reign on the day of his father's funeral, though

far—effect is given to the dispositions of the will through the council by the ordinary machinery of the state, cp. Nicholas iii 34, 49, 57, 60, 68, 69, 100, 105, 115, 127, 131; iv 128, 143, 144, 226, 229, 230.

[1] Vol. ii 253.
[2] Ibid 255-256, 564.
[3] L.Q.R. xvii 132.
[4] Stubbs (Sel. Ch.) 98.

absent at the time in the Holy Land.[1] Succeeding kings began to reign immediately on the demise of their predecessors. But even as late as 1485 many supposed that there would be a short interregnum after the battle of Bosworth;[2] and in the reign of James I. the judges found it necessary to resolve that "coronation is but a royal ornament and solemnization of the royal descent, but no part of the title;" and that "by the laws of England there can be no interregnum within the same."[3]

It was recognized in Henry III.'s reign that the king could be under age, and was entitled to the privileges of minority. Like any other infant he insisted that, with respect to his rights, the *status quo* should be maintained during his minority, and that therefore grants made during his minority needed confirmation when he came of age.[4] That view was acted on when in 1225—the year after Henry III.'s minority had been declared to be at an end—the Great Charter and the Charter of the Forest were confirmed at a price;[5] and thus the fact that Magna Carta assumed its final form in that year is due to the fact that the king till then was a minor. Even in Henry VI.'s reign we can see some traces of this idea;[6] but by that time it was beginning to be seen that it was possible to distinguish the king from the human child who occupied the throne. Already in Edward III.'s reign a reporter tells us that several "peers and sages of the realm" are saying that the king's gift will not be defeated by his nonage; but he adds a quære.[7] In 1427[8] the chancellor "reherced that how be it that as great auctorite of governaille is now in oure saide sovereign lorde's persone duryng his saide tendre eage as ever shal be hereafter." When such words could be spoken the law is not far from the idea that the king is never a minor. But, though such an idea was fostered by a minority, it tended all through this period to sink into the background when the age of majority was attained.

We do not find that any one says that the king can do no wrong. Indeed, the council made due provision for the physical

[1] P. and M. i 506. Henry VI. succeeded the day after Henry. V.'s death Nicholas iii 1.

[2] "The council of the city [of York] which used to date its sittings by the year of the king's reign, wrote, the day after Henry's victory, 'vacata regali potestate,'" Gairdner, Letters and Papers of Richard III. and Henry VII. (R.S.) ii xxxi.

[3] Calvin's Case (1608) 7 Co. Rep. 10b, 11.

[4] Below 513; P. and M. i 507, 508. [5] McKechnie, Magna Carta 153-155.

[6] Nicholas iii 324, the council will not definitely decide the question whether Beaufort's acceptance of the cardinal's hat meant vacation of his English bishopric, because "Nolebant nec audebant præjudicare Regi durante minore ætate;" cp. also ibid 325; ibid iv 95, it is said that a truce with France might be concluded, but not a permanent peace, "for as of pes it semeth there ne may noon be concluded considering the tendrenesse of the King's aage;" perhaps we may see the same idea in ibid iv 62, where it is said that offices should be filled preferably by appointing those who had served the king's father or grandfather; for survivals in Ed. VI.'s reign see Tanner, Constitutional Documents 100.

[7] 26 Ass. pl. 54. [8] Nicholas iii 238.

chastisement of Henry VI.'s faults;[1] and they remonstrated with him if he attempted to disregard their advice, pointing out his lack of years and experience.[2] It is true that the king could not be sued in his own courts. Whatever doubts there may have been in the thirteenth century as to the existence of a power in the assembled baronage to coerce the king,[3] his incapacity to be thus sued had been a recognized principle of English law since Bracton's days;[4] but this is no peculiar privilege; for no feudal lord could be sued in his own court.[5] It is remarkable that in Edward III.'s reign judges could be found who believed the fable told by a counsel in 1307[6] that there had been a time when the king was sued in his own courts like an ordinary person.[7] But this fact shows clearly enough that the law had not yet come to the conclusion that the king can do no wrong. It would have been impossible for any judge to have believed this fable, if, as in later times, the king's incapacity to be sued had been regarded merely as a particular consequence flowing from the general principle that he can do no wrong. But just as we can see some signs of the growth of the idea that the king cannot be a minor,[8] so we can see some signs of the growth of the idea that the king can do no wrong. We have seen that lawyers and political philosophers held the view that restraints on the king's power which prevented him from doing wrong were no real diminution of his power;[9] and this view was, it seems to me, the basis of the practical rule laid down by Huse in 1485 that there were certain acts which the king could not do, as, if he did wrong, the subject would have no remedy.[10] But, when once this practical rule has been accepted, it will soon seem to be a somewhat obvious consequence that the king can do no wrong. And in fact this consequence was being drawn, and older views were disappearing, simultaneously with the statement of this practical rule. In 1342-1343 there was no hesitation in imputing a wrong to the king;[11] and this was in accordance with the language of

[1] Nicholas iii 297, 298, 300—"Item the said Erle shal have auctorite and power to chastise the Kyng after his goode avis and discrecion whan the Kyng trespasseth or doth amys;" see also ibid iv 134, 135.

[2] Ibid iv 287-289; v 88, 89. [3] Vol. ii 255.

[4] P. and M. i 500, 501; Bracton's Note Book case 1108 there cited.

[5] P. and M. i 502, "He cannot be compelled to answer in his own court, but this is true of every petty lord of every petty manor; that there happens to be in this world no court above his court is, we may say, an accident."

[6] Y.B. 33-35 Ed. I. (R.S.) 470.

[7] Y.BB. 22 Ed. III. Hil. pl. 25; 24 Ed. III. Trin. pl. 40; 43 Ed. III. Mich. pl. 12; for an account of these cases, and for the history of the growth of special remedies against the crown see Bk. iv Pt. II. c. 6 § 1.

[8] Above 464. [9] Vol. ii 253, 435. [10] Above 388 n. 5.

[11] "If the escheator, with warrant, take an inquest which serves for the king's benefit, and he seizes, he does no wrong in seizing, as the fact is in our case, *and whether the king had right or committed wrong*, the thing seized shall be sued out of his hand," Y.B. 17 Ed. III. (R.S.) 164 *per* W. Thorpe, *arg.*

Bracton and of later authorities.[1] In 1457 it was affirmed on one side and denied on the other that the king could be a disseisor;[2] and in 1483 the question whether or no the king could be a disseisor led to a statement in the Chancery, which was agreed to by all the judges and serjeants, of the general principle that the king cannot commit a wrong.[3] But as yet this was a very new principle. It was not till the sixteenth century that, with the growth of the idea of the dual capacity of the king, it became acclimatized in the law. It was not till the seventeenth century that it was made the basis of the modern doctrine of ministerial responsibility.[4]

In fact throughout the mediæval period, the king, though he was the head of the state, was regarded as a natural man. Except when the king was a minor we see but few signs that any one thinks that he has one capacity as man and another as king. The feudal ideas as to the king and his prerogative prevented the growth of such a notion. To have allowed that the king was a ruler differing in kind from any other ruler would have run counter to the deeply-rooted ideas which saw in him and his powers little more than the person and the powers of a feudal lord enlarged. It would have seemed to many that a king whose powers were greater and altogether unlike those of other lords would be a tyrant. Therefore, to elevate unduly the office and the prerogative of the king, and to theorize about his kingly capacity as the head of the state, was not a popular exploit, as Richard II. found to his cost.[5] On the other hand, the king, from his point of view, might well think twice before adopting it. A separation between his prerogative and his person might mean a diminution of that free control which he exercised over his property, and of that free discretion which he exercised in the government of the state. It might be argued that the natural man ought to be restrained in the interests of the kingly office. It was chiefly for this reason that in Edward II.'s reign the assertion of this doctrine had been made the basis of accusations of treason.[6] It was a suspected theory—suspected both by

[1] See Ehrlich, Vinogradoff, Oxford Studies vi 42-43, 127-128.

[2] Y.B. 35 Hy. VI. Trin. pl. 1 (p. 62) Danvers, J., said, "Le Roy puit faire tort a un sibien come un auter person puit faire, et envers luy jeo auray remedy per voie de petition come jeo auray envers auter person per voie d'accion;" but Moyle, J., said at p. 61, "Le Roy ne disseisera aucun home."

[3] "Le Roy ne poet esse dit que fist tort; car si on veut disseiser un auter, al œps le Roy, ou le Roy n'ad droit, le Roy ne poet esse dit disseisor," Y.B. 1 Ed. V. Trin. pl. 13; cp. Ehrlich, Vinogradoff, Oxford Studies vi 139 n. 4.

[4] Hale P.C. i 43-44—"It is regularly true that the law presumes the king will do no wrong; and therefore if the king command an unlawful act to be done, the offence of the instrument is not thereby indemnified;" for a clear statement of the modern rule see Feather v. the Queen (1865) 6 B. and S. at pp. 295, 296 *per* Cockburn, C.J.

[5] Vol. ii 411, 414.

[6] Above 290.

king and subject. It is only very occasionally that we can see any hints that the king has two capacities [1]—though the idea of a double capacity was otherwise not unfamiliar to the lawyers.[2] If it is a case of resuming improvident grants made by a predecessor it may be convenient to say that the crown is, as it were, a minor, and that such transactions can be revoked.[3] Similarly, if the crown wishes to assert rights which its subjects have usurped, it will be convenient to say that, as against the crown, no lapse of time will be a bar—whatever this or that king may have done or neglected, such acts or neglects cannot tell against the crown;[4] and in 1470 it was beginning to be seen that in the interests of good government certain acts even of a usurper must be held to be valid.[5] But the king is slow to assert this theory or to allow it to be asserted when it makes against his interests. In the same case of 1470 it was argued that the validity of one of Henry VI.'s grants must be determined upon the same principles as those which were applied to determine the position of an owner who, having been disseised of his land, had got back into possession.[6]

In the sixteenth century, when the king was regarded as possessing both a politic and a natural capacity, it was said that the king could not be seised to a use because a body politic could not be so seised.[7] One case from the Year Books of Edward IV. was cited for the rule;[8] but it does not bear out the later reason given for it. In Edward IV.'s reign the legislature recognized that kings had in fact been seised to uses;[9] and the reasoning of the case cited seems to proceed either upon the ground that the king ought to be indifferent as between all his subjects, which he could not be if he was seised to the use of one of them,[10] or upon the ground that, it being necessary that the king should be seised by matter of record, he could not be seised by deed of feoffment and livery of seisin; and that, therefore, an office which found that he had been thus enfeoffed by

[1] See P. and M. i 508, 509.

[2] In Y.B. 20 Ed. III. (R.S.) i 370 the theory is put forward that the Archbishop of Canterbury has two capacities—one as archbishop and the other as ordinary.

[3] Plac. Abbrev. 339 (15 Ed. II.) cited P. and M. i. 509 n. 1.

[4] Vol. i 87; Y.B. 18 Ed. III. (R.S.) 156.

[5] "Le Roy H. fuit Roy en possession, et il covient que le roialme eit un Roy south que les leyes seront tenus et mainteins, doncque pur ce que il ne fuist eins forsque per usurpation, uncore chescun judicial act fait per luy que touche jurisdiction royal sera bon, et liera le Roy de droit," Y.B. 9 Ed. IV. Pasch. pl. 2, cited Vinogradoff, L.Q.R. xxix 279.

[6] Y.B. 9 Ed. IV. Pasch. pl. 2; cp. 9 Ed. IV. Trin. pl. 3, cited L.Q.R. xxix 279.

[7] Willion v. Berkeley (1562) Plowden at p. 238.

[8] Y.BB. 5 Ed. IV. Mich. pl. 15; S.C. 7 Ed. IV. Mich. pl. 11—a traverse of office; for the nature of the proceedings see Bk. iv Pt. II. c. 6 § 1.

[9] 1 Edward IV. c. 1 § 14.

[10] Y.B. 7 Ed. IV. Mich. pl. 11 *per* Markham, C.J., at p. 17b.

deed to the use of another was wholly void.[1] Richard III., it is true, divested himself by statute of all property of which he had been seised to the use of others;[2] but the statute contains no hint that it was legally impossible that he should hold to another's use. The reason assigned is that if the king should remain so seised, "hurte, trouble and charges" might be caused to the cestui que use—and in this we may well see an indirect reference to the uncertainty of the royal title to the throne, and therefore a testimony to the want of any distinction between the person and property of the natural man and the king. In Henry VII.'s reign it was recognized that the king might be seised of land "in right of the crown or otherwise;"[3] but in the same reign a a statute was needed to make it clear that faithful service to a reigning king was no treason to a successful claimant to the throne;[4] and Stephen is probably warranted in saying that this statute is "the earliest recognition to be found in English Law of a possible difference between the person and the office of the king."[5]

The view, therefore, that the king, though the head of the state, is yet a natural man with no sort of double capacity helped to preserve the influence of the feudal ideas which all through this period coloured men's political thoughts. It is not until these feudal ideas have ceased to influence politics, it is not until men have begun to think of their ruler as the national king of a modern state, that he acquires other capacities, and that his prerogative begins to assume another form. It is not till then that the feudal element in that prerogative will only be traceable in certain small incidental rights—the survivals of an obsolete form of political society.[6]

But, though these feudal ideas were reduced to a very subordinate position in the later common law, we shall see that certain of their consequences long continued to influence the law relating to the king and his prerogative, and, perhaps, influence it even at the present day. But the manner in which the new political ideas of the sixteenth century completely changed the nature of the prerogative, and the reason why some of these

[1] Y.B. 7 Ed. IV. Mich. pl. 11 *per* Markham at pp. 16b, 17b; *Brian* thought the feoffment good and the use bad; but his reasoning is not clear; throughout the case there is no hint of any double capacity in the king—the chief point argued being the validity of the office found.

[2] 1 Richard III. c. 5.

[3] R.P. 7 Hy. VII. no. 5 (vi 444).

[4] 11 Henry VII. c. 1.

[5] H.C.L. ii 254 n., "This statute may perhaps be regarded as the earliest recognition to be found in English law of a possible difference between the person and the office of the king, though nothing can be more vague and indirect than the way in which the distinction is hinted at."

[6] See Figgis, Divine Right (1st ed.) 30.

mediæval ideas were revived in the seventeenth century, are topics which belong to the legal history of those centuries.

§ 2. The Incorporate Person

I have already said something of those numerous groups of persons whose activities fill so large a space in the law of the thirteenth and fourteenth centuries.[1] They comprised bodies so dissimilar as counties, boroughs, hundreds, townships, manors, merchant gilds, trading gilds, chantries, deans and chapters, monasteries of various kinds, the universities, and the societies of lawyers which developed into the Inns of Court. Some of these groups were dissolved into their component parts either by the logic of the doctrines of the common law and by the procedure of the common law courts, or by changes in agricultural methods, or by changes in commercial organization. Some remained as groups. In the department of local government such entities as counties, hundreds, and townships will be known to the end. They were and are essential parts of the constitution, and, as we have seen, our constitutional law has been the most conservative of all branches of the common law. But, as the work of local government tended to fall more and more into the hands of the justices of the peace and their subordinates,[2] these entities tended to look less like communities and more like geographical expressions. They do not, however, sink to the level of merely geographical expressions. Though the older powers of these self-governing communities were placed in other hands, the old traditions of self-government were carried on by their successors; and a continuous traditional sentiment was helped by rules of law which recalled the older order.[3] In our own days, therefore, it has been possible to use them as the basis of a reformed scheme of local government in which the new and the old are combined. Elsewhere we do not see many instances of the survival of these groups—the greatest examples of such a survival are the Inns of Court.[4]

When we have exhausted the classes of groups which were dissolved and the classes of groups which remained, we are left with the third class which is the subject of this section—the class which became corporations. It was neither possible nor desirable to dissolve all these groups into their component parts. To use the words of Sir F. Pollock,[5] "in a complex state of

[1] Vol. ii 401-405. [2] Vol. i 285-288.

[3] E.g. rules as to the venue of the jury, liability of the hundred for damage, the surviving franchises.

[4] Vol. ii 493-503; cp. Maitland, Political Theories of the Middle Age xxxi.

[5] Contracts (5th ed.) 109.

civilization, such as that of the Roman Empire, or still more of the modern Western nations, it constantly happens that legal transactions have to be undertaken, rights acquired and exercised, and duties incurred by a succession of sole or joint holders of an office of a public nature, involving the tenure and administration of property for public purposes, or by or on behalf of a number of persons who are for the time being interested in carrying out a common enterprise or object." This being the case, it is necessary from the point of view both of private and of public law to replace the old vague group by something more definite. The law knows the natural person. Its rules and its process are fitted to deal with him. They are not fitted to deal with indeterminate groups which exist, and yet show a tendency to crumble when an attempt is made to apply legal rules in detail to themselves and their activities. It is for this reason that the law adopts the device "of constituting the official character of the holders for the time being of the same office, or the common interest of the persons who for the time being are adventurers in the same undertaking, into an artificial person or ideal subject of legal capacities and duties."[1] Thus we get the division between "persons natural created by God," and "persons incorporate or politick created by the policy of man . . . either sole or aggregate of many."[2]

This conception of an "incorporate person" was becoming naturalised in our law at the end of this period. It is neither a primitive nor a native conception. When Bracton wrote it had not been clearly perceived even by the canonists and civilians of his day.[3] The first person to call a group of persons a *persona ficta* was, according to Gierke, Sinibald Fieschi, who in 1243 became Pope Innocent IV.[4] As to the fictitiousness of this incorporate person there has been in these days much learned dispute; and it may be doubted whether Innocent IV. was prepared to draw from the fictitiousness of the personality of this incorporate group all the consequences drawn by later lawyers.[5] But, fictitious or not, it was to be regarded henceforth as a person and coordinated with natural men. This conception was received by the common lawyers because it supplied a useful explanation of certain associations which frequently appeared in the law courts as the owners of property or franchises, a useful theory for the regulation of their activities, and a useful mode of checking the too frequent multiplication of these bodies.

[1] Pollock, Contracts (5th ed.) 110.
[2] Co. Litt. 2a.
[3] P. and M. i 477.
[4] Political Theories of the Middle Age xix.
[5] See H. A. Smith, Law of Associations 152-157.

It was from the associations in which the property of the church was vested, and through which its various activities were exercised, that we get the earliest development in the direction of the establishment of this new law of incorporate persons. Nor is this fact surprising. The church had from the earliest times been a large property owner. This property belonged at the end of this period to archbishops, bishops, deans and chapters, monasteries, or rectors. Such persons were at the end of this period corporations sole or aggregate, and owned this property in their corporate capacity. But before this useful device was known to the law we see the very greatest uncertainty as to who the owner of the property really was. If a man gave property to a church or a monastery he gave it to the patron saint.[1] "Gradually (if we may so speak) the saint retires behind his churches; the church rather than the saint is thought of as the holder of lands and chattels.[2] But the old idea was not lost sight of. Bracton tells us that a gift to a church is made in the first place to God and the saint, and only in the second place to the ecclesiastic in charge of it.[3] But this property was managed by a human being or by groups of human beings. These groups were, it is true, said to be perpetual—not because they were fictitious persons which by their nature were exempt from death and other ills of mortal life, but because they were like a flock of sheep, which is always the same flock by the constant renewal of its parts[4]—an idea which Blackstone borrowed to explain the immortality of the modern corporate body.[5]

What, then, was the relationship of these persons or groups to this property? They were clearly not owners. But they exercised many of the powers of owners in relation to the property of the church. The common law showed a tendency to treat the church as a minor, as a being, that is, who could complain if its guardian by wrongful acts exposed it to loss.[6] "The

[1] P. and M. i 481, 482. [2] Ibid 482.

[3] ff. 12, 375; above 35 n. 1.

[4] Bracton f. 374b, "In collegiis et capitulis semper idem corpus manet, quamvis successive omnes moriantur, et alii loco ipsorum substituantur, sicut dici poterit de gregibus ovium, ubi semper idem grex, quamvis omnes oves sive capita successive decedant;" cp. this with Y.B. 17 Ed. III. (R.S.) 14, "The Chapter is always one and cannot die;" and see below 484 for later statements as to the immortality of the fictitious person. In Germany, we are told, by Schulte, Droit D'Allemagne (Tr. Fournier) 186, "A la suite de cette conception de l'empire franc qu'une personne juridique n'existait pas et ne pouvait avoir de propriété, chaque Eglise dut avoir une personne physique comme son Seigneur. Pour les petites Eglises, ces seigneurs furent, en general, les propriétaires fonciers; pour les abbayes, ce furent les particuliers; pour un grand nombre des deux, ce fut le roi."

[5] "All the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law, a person that never dies; in like manner that the river Thames is still the same river, though the parts which compose it are changing every instant," Bl. Comm. i 456.

[6] Bracton ff. 12, 226b; Y.B. 20, 21 Ed. I. (R.S.) 32; below 517.

church," said Westcote, *arguendo*, in 1313-1314, "is within age;"[1] from which he deduced the conclusion that the neglect of a prior to claim his franchises at a general Eyre ought not to prejudice him. If an abbot attempted to alienate the abbey lands, his successor could recover them; and a special action was invented to enable him to do so.[2] The church or the abbey or the chapter is regarded as continuing, though its human administrators come and go;[3] and in 1313 it seems to have been thought that when a prior had waged his law his successor could perform it.[4] At the same time the law does not as yet very distinctly realize this continuing entity. It is a somewhat passive owner, very much in the hands of its mortal administrators.[5] It suffers from a negligent administrator. It grows rich under one who is prudent. But it itself does nothing. We talk of its "*mort main*" when we wish to describe its characteristic as a landowner: we might well think that not only its hand, but also its whole body was dead for all the active life that we can see. It is true that by a proper use of the seal the monastery or the chapter might be bound.[6] But in early days this is far more probable because the use of the seal was conclusive evidence of the transaction than for any other reason;[7] and we shall see that the later rule as to the necessity of signifying corporate consent by the seal was probably an outcome of this earlier rule of evidence.[8] However that may be, it is clear that a sealed document would bind the community—even though the community at the time of the transaction had no head.[9] But this decision

[1] The Eyre of Kent (S.S.) iii 184.

[2] Bracton f. 12; above 24; cp. Y.B. 3, 4 Ed. II. (S.S.) 91, "Albeit his predecessor had charged the tenement with suit, the successor would be received to discharge it." *per* Stanton, J.

[3] Bracton f. 374b, 375; Y.B. 32, 33 Ed. I. (R.S.) 8, "*Herle.*—We admit that we have avowed for the arrears of nine years, and we have been Prior for sixteen years. *Howard, J.*—If there were arrears for the time of the predecessor, do you not think that the church should have them? (intimating the affirmative)."

[4] Y.B. 6, 7 Ed. II. (S.S.) 176; at p. 175 Inge, J., says, "Abbot and Prior are names of dignity; and in virtue of that dignity the right that was in the predecessor will so wholly vest itself in the person of the successor after his creation that none other than he can defend the rights of his church."

[5] It is even said sometimes that the goods of the house belong to the abbot, Y.B. 48 Ed. III. Mich. pl. 10; cp. Y.B. 4 Ed. II. 109; in Y.B. 20, 21 Ed. I. (R.S.) 34 *Mutford* argued that a writ against a dean and chapter would abate if the whole chapter were changed; and in 1313 an action against the abbot of Westminster did abate on death of the Abbot, Y.B. 6, 7 Ed. II. (S.S.) 36; on the other hand, there was a contrary decision in 1312, Y.B. 6 Ed. II. (S.S.) i 85.

[6] See e.g. Y.BB. 20 Ed. III. (R.S.) i 96, 98; 22 Hy. VI. Mich. pl. 6; below 489.

[7] Above 417. [8] Below 489.

[9] Y.BB. 8 Ed. II. (S.S.) 132 *per* Bereford, C.J.; 7 Ed. III. Trin. pl. 35—the court decided for the plaintiff both on the ground of the deed and on the ground that the money lent and promised to be repaid by the deed had come to the profit of the house, "La court tient le fait a nient dedit, et que les deniers deviendront al profit de la meason;" cp. Y.B. 20 Hy. VI. Trin. pl. 35.

was based partly upon the ground that the community had benefited; and the contracts of an abbot, even if made by him in his personal capacity, might make the community liable if it had benefited thereby.[1] Unless, however, a contract or conveyance had been made under the seal of the community regularly affixed, or unless the community had actually had the use of property or other benefits, it could not be liable.[2]

The most important of these ecclesiastical bodies were under one head with large powers. The abbot, for instance, ruled over a community of monks who were dead persons in law; and though there were cases in which the management of affairs was in the hands of the community, the division of ecclesiastical property between abbots, priors, bishops, chapters, and prebends tended to bring the common law courts into contact with individuals rather than groups.[3] Thus in the case of the abbey, though the property when recovered might belong to the house, the rights to sue were rights to be exercised by the abbot and not by the house;[4] and those rights, if in respect of a wrongful act, died with him before the Statute of Marlborough.[5] An irregular conveyance could, as we have seen, be set aside; but the right to set it aside was the right of the new abbot.[6] Similarly, liability upon a tort committed by a deceased abbot died with him;[7] and the same rule would apply to liability upon a contract, unless made under the abbey seal, or unless the house had benefited.[8] The abbot was liable for the torts of his monk[9]—as a husband for the torts of his wife;[10] and this analogy tended to strengthen the idea that the property in the goods of the house could be laid in the abbot. We may note that this rule as to the delictual liability of the abbot helped to solve what in later law is a difficult problem. Even at the present day we might find it difficult to justify in theory the practice of holding a corporation to be liable in tort, if we were not helped by the

[1] Y.B. 39 Hy. VI. Mich. pl. 31—the question whether, if an abbot bought things for the use of the house and died before they had come to the use of the house, his successor should be charged, was treated as open.

[2] Y.B. 39 Hy. VI. Mich. pl. 31; this was a case of a contract to pay an annuity in return for counsel given; the court said, "L'action n'est maintenable envers le successor de nul contract ou escript fait per le predecessor, sinon que l'effect vient al profit del Meason, pur ceo que cestuy grant ne fuit forsque solement le fait l'Abbe predecessor, et nemy le fait de le Convent."

[3] P. and M. i 484-489.

[4] Y.B. 9 Hy. VI. Trin. pl. 21; above 472 n. 5.

[5] 52 Henry III. c. 28; cp. Y.B. 4 Ed. II. 109.

[6] Above 472 n. 2; P. and M. i 485.

[7] Y.B. 49 Ed. III. Mich. pl. 5.

[8] Eyre of Kent (S.S.) ii 33, 47; Y.BB. 20 Ed. III. (R.S.) ii 552-554; 20 Hy. VI. Hil. pl. 19.

[9] Y.BB. 48 Ed. III. Mich. pl. 10; 49 Ed. III. Mich. pl. 5.

[10] Below 531.

modern doctrines of employers' liability.[1] The common law of the Middle Ages had not, as we have seen, this resource.[2]

These rules show us very clearly the difficulties which arose from the want of a distinct conception of the nature of the personality of these ecclesiastical groups. In fact, these continuing though somewhat passive entities badly needed to be embodied in some tangible form if they were to live and flourish in this transitory world of human beings and elaborate laws for human conduct. The theory that they were *personæ fictæ* gave them just that reality which they needed. Lawyers could speculate about their nature, and rules could be laid down for their conduct. They were no longer concealed by the activities of those who were, for the time being, their human representatives. They were persons created by the law, distinct from their human members. They were immortal and invisible. They could commit neither sin nor crime; and some said no tort[3]—truly suitable representatives for saints and churches.

When once this generalization had become the accepted theory of the canon law, it was inevitable that it should affect the common law. These *personæ fictæ* were with ever increasing frequency litigants in the common law courts;[4] and, when the common lawyers became familiar with them, and with the canonists' theories concerning them, they naturally proceeded to apply these theories to other groups which had nothing to do with the church. The boroughs, the universities with their colleges, and the gilds, were groups to which this conception could easily and profitably be applied. Owing to their manifold activities, the boroughs were the group which, from the point of view of the development of legal doctrine, are the most important. Moreover, they were bodies composed of many members; and, that being so, the body itself stood out with greater distinctness from its individual members.

We have seen that even in the thirteenth century the borough was a community more highly organized than the other communities through which the local government of the country was conducted.[5] Even in Edward II.'s reign it is referred to as "un corps;"[6] and in Edward III.'s reign it was definitely taking its place as an independent body (*un*

[1] Political Theories of the Middle Age xxxix, xl; Salmond, Jurisprudence 291-293.

[2] Above 384.

[3] Political Theories of the Middle Age xix.

[4] P. and M. i 489, 490.

[5] Vol. ii 392-395.

[6] Y.B. 4 Ed. II. 103, *Herle, arg.*, "Non est simile que c'est un custume regard a chescun persone separatim, mes c'est custume a un comminalte come a un corps;" below 482-483.

gros) side by side with monasteries and chapters.[1] As Pike puts it, "The lawyers had often been troubled by the question whether something in dispute was appendant or appurtenant to something else, or was a thing by itself and independent, which they called a gross. . . . By a curious psychological process they realized that what we now call a corporation was a 'gros,' or something which had an existence *per se:* and this something they called alternatively 'un corps.' Thus they came to the idea of an individuality composed of the members of a corporation, or as we might now say, to the idea of a *persona ficta*."[2]

During the fourteenth and fifteenth centuries some of the leading consequences of this conception were elucidated. This we shall see if we look at some of the rules which were being developed as to the creation of these incorporate persons, as to their varieties, as to the nature of their corporate personality, as to their powers capacities and liabilities, and as to their dissolution.

Creation.

One of the greatest differences between these new corporate bodies and the older indeterminate groups is to be found in the mode of their creation. The older groups formed themselves naturally. The corporation was an artificial creation; and except in the palatinates, where the *jura regalia* had been granted to a subject,[3] they must be created by the state, or, in the case of ecclesiastical corporations, by the Pope.[4] The Pope's powers disappeared of course at the Reformation, and the palatine jurisdictions gradually decayed, so that we get the modern rule that a corporation can only be created either mediately or immediately by the crown,[5] or by Act of Parliament.[6]

This rule is in accordance with the theories of the canonists who held that it was only the sovereign who could make a

[1] P. and M. i 489; 22 Ass. pl. 67, a commonalty cannot be imprisoned or outlawed; note, however, that the conclusion here drawn, that trespass does not lie against it, was not followed, below 488; 49 Ass. pl. 8, the commonalty of London is "perpetuel," "d'antiquity," and "un gros."

[2] Y.B. 16 Ed. III. (R.S.) i xlvi.

[3] Vol. i 109; cp. Grant, Corporations (ed. 1850) 11.

[4] Below 477.

[5] Grant, op. cit. 11, 12; for some instances where one corporation has created another—a right which must have been conferred by the crown, see ibid 12 n. *m;* 49 Ass. pl. 8; Henry VIII.'s charter gave this power to Oxford University, see H. A. Smith, Law of Associations 157.

[6] That a statute could create a corporation was well recognized in the Middle Ages, below 476; for a statutory power given to persons to found and incorporate hospitals and houses of correction see 39 Elizabeth c. 5.

persona ficta.[1] But it would seem that English law arrived at this result by a road of its own.

We have seen that such corporate communities as cities or boroughs in all cases comprised a franchise or franchises.[2] The rule that all franchises depended upon the king's grant was clearly laid down by Bracton,[3] and was enforced by Edward I.[4] In Edward II.'s reign the judges deduced from this rule the consequence that it was only bodies like cities or boroughs possessed of a royal charter giving them capacity to take franchises, which could claim them. Without such a charter a community was not capable of taking the grant of a franchise, and could not therefore claim it by prescription.[5] Clearly we are getting near to the idea that a royal charter can create a new body with a capacity different to that of a mere community. Such a community is, as Herle said, "un corps."[6] It is not surprising therefore to hear it said in the first half of the fourteenth century that there can be no "commonalty" capable of taking a grant of property without royal charter;[7] and that, as such a charter will generally be a royal charter, all escheats in these communities must go to the king.[8] Thus the right itself to be such a community could obviously be regarded as a franchise;[9] and this reinforced the view that these grants of incorporation were dependent on royal grant. Both these lines of argument probably helped the court to arrive at the decision of Edward III.'s reign already cited.[10] It never seems to have been doubted that what could be done by royal charter could be done by Act of Parliament with even greater effect. Both in Edward III. and Edward IV.'s reigns it was assumed that an Act of Parliament could not only create a corporation but also cure defects in a royal charter of incorporation.[11] And defects there might well be; for it had been solemnly declared in 1359 that a charter which

[1] Political Theories of the Middle Age xxx.

[2] Vol. i 139. [3] Ibid 87. [4] Ibid 88.

[5] "You must remember that you, who are a community, are in a very different position, in the matter of claiming a franchise by prescription, from that in which Sir W. Ormesby, or any other individual person who might claim through his ancestors, would be; *quia communa non est capax libertatis*, and a city cannot be a city unless it was originally constituted one by grant of the king," the Eyre of Kent (S.S.) i 131 *per* Staunton, J.; for an explanation of this passage see vol. i 90 n. 5.

[6] Above 474 n. 6. [7] 49 Ass. pl. 8 *per* Knyvet.

[8] "All escheats within cities accrue as of right to our lord the king, no matter of what lord the lands be held," the Eyre of Kent (S.S.) i 93.

[9] "A classical definition has taught that 'a Corporation is a Franchise,' and a franchise is a portion of the State's power in the hands of a subject," Maitland, Political Theories of the Middle Age xxxi, citing Kent, Comm. Lect. 33.

[10] 49 Ass. pl. 8; above n. 7.

[11] 49 Ass. pl. 8; Y.B. 21 Ed. IV. Mich. pl. 28 p. 59.

infringed the rules of the common law was void;[1] and in the litigation between Lowestoft and Yarmouth in 1378-1380 it was assumed that a royal charter which contained provisions contrary to an Act of Parliament was void.[2] In Henry VIII.'s reign Fineux, C.J., said that corporations might be by grant of the king or pope, or both, or by Act of Parliament, or at common law.[3] Thus the theories both of the canon law and of the common law led to the same result. No doubt the theories of the canon law helped the common lawyers to arrive at the conception of the incorporate person. But both in respect to the manner of its creation, and, as we shall see, in respect to many another of its incidents, native rules and reasoning produced the actual English law relating to it.

This new rule of law cut across the older rules which allowed many powers to unincorporate groups.[4] Many of these groups existed, and were habitually acting as if they were corporations; and some concession was made to the actual facts of English life by the recognition of the rule that a corporation might be by prescription.[5] Though an unincorporate community could not prescribe to take a franchise or any other property, such a community might acquire the status of a corporation, and therefore capacity to take, by prescription. Another concession was made in the rule that a corporation for a limited purpose might arise by implication—as where the king grants land to the men of a certain vill rendering rent, they will be a corporation for this purpose.[6] Another concession was made in the rule that such persons as churchwardens might be a quasi-corporation for certain purposes.[7]

[1] Vinogradoff, Oxford Studies vi ix, x.

[2] Select Cases before the Council (S.S.) 61, 62, 68-69—the contention of Lowestoft; Yarmouth did not deny the principle but asserted that their charter had Parliamentary sanction, ibid at p. 66; for an assertion of this principle on the Calendar of Patent Rolls, April 28, 1381, p. 633, see ibid xci.

[3] Y.B. 14 Hy. VIII. Mich. pl. 2; see the passage cited L.Q.R. xvii 133.

[4] Vol. ii 377.

[5] Y.BB. 34 Hy. VI. Mich. pl. 6; 1 Ed. IV. Mich. pl. 15.

[6] "Nota que fuit tenu en le Comon Bank que si le Roy done terre en fee ferme probis hominibus villæ de Dale, que le corporation est bon," Y.B. 7 Ed. IV. Trin. pl. 7; "Si le Roy grant *hominibus de* Islington que ils seront discharges de toll, c'est bon corporation a cest intent, mes nemy a purchaser," Y.B. 21 Ed. IV. Mich. pl. 28 (p. 59) *per* Brian, C.J.; but such a grant of corporate character would not be implied when it would run counter to rules of law, e.g. if the king gave to another the right to give to an uncertain person the power to take property, the gift could not be supported by supposing that he had created a corporation, Y.B. 2 Hy. VII. Hil. pl. 16.

[7] "En ma opinion un done fait des biens al use de paroissiens est assez bon pur le saufgard de tiels choses que sont dons, dont covient esse ascuns persons a prendre, et a ceo extender le Corporation per le Common Ley, car par common reason ils sont charges ove divers choses appurtenant al Eglise de trover ornaments *et similia*, lequel common reason eux admet *able* a purchaser les choses avandits, et a ceo extender lour Corporation, et a nul auter entente," Y.B. 12 Hy. VII. Trin. pl. 7 (p. 29) *per* Fineux, C.J.

These concessions show that this new law of corporations did not wholly fit the facts of English life; and in some cases the legislature has found it necessary to intervene—e.g. it has given to churchwardens powers of which these new theories had deprived them.[1] But we shall see in succeeding volumes that the best corrective will be found in the Chancellor's development of the conception of the use or trust.[2] An attempt was made to apply this idea to an unincorporate group in Edward III.'s reign.[3] But we shall see that by that time the law had made up its mind not to recognize the interest of the persons to whose use land was held. A fortiori it refused to recognize that an unincorporate group, which had no power to purchase, could have such a beneficial interest in land.[4] There are some signs that it might have recognized in exceptional cases the interest of a group to whose use chattels were held.[5] The recognition of such a use was not wholly contrary to the principles of the common law,[6] But it was contrary to those principles to allow that an indeterminate group could own property;[7] and so the law favoured the somewhat inadequate idea of a quasi-corporation in certain exceptional cases.[8]

But though this new theory of corporations tended to limit narrowly the activities of these unincorporate groups, this limitation had, from the point of view of public law, many compensating advantages. In fact it was a result which was necessary in the interests of good government. Both at Rome and in England a mature system of law and a centralized system of government have found it necessary to limit the free power of association which is characteristic of a more primitive period in the history of law. Under both systems of law a few of the older associations lived on as survivals of the older order; but in both the state found it necessary to maintain some control over the formation of new associations.[9] In the Middle Ages an unlimited power to form

[1] Grant, Corporations (ed. 1850) 607-608, citing 9 George I. c. 7 § 4, 41 George III. c. 23 § 9, 59 George III. c. 12 § 17.

[2] Bk. iv. Pt. I. c. 2.

[3] In 49 Ass. pl. 8, it was argued that though an unincorporate gild could not purchase property, "uncore la done fait a eux que preigne al oeps de ceux de la Comminalte de la gild est assez bon," just as a gift to the monk to the use of the house gives an estate to the house; but this was denied; the gift to the monk to the use of the house might be good because the house could purchase, but the gild, being unincorporate, could not.

[4] Y.B. 13 Hy. VII. Mich. pl. 5, "Fuit tenu per touts les Justices que cel use ne peut estre bon in les paroissiens, car ils n'ont pas capacite de purchaser per meme le nom, nient pluis ils n'ont pouvoir daver ascun feoffment fait a lour oeps."

[5] Y.B. 37 Hy. VI. Trin. pl. 11, a devise of a book to the use of the parish was held good by Moile, J., *in favorem Ecclesiæ*, and because the parishioners are bound to find a mass book, chalice, and vestments.

[6] Above 171 n. 2.

[7] Above 170.

[8] Above 477 nn. 6 and 7.

[9] Girard, Droit Romain 230, "On peut donc dire que le droit romain suit, en ce matière, le système de la *concession*, selon lequel la personalité morale n'existe

groups would have meant the partition of the powers of the state among the larger landowners and the towns. It would have prevented the growth of any common law. It would have meant a wholesale reception of Roman law at a later period to fill the gap caused by the absence of any common law. The history of mediæval Germany should be somewhat of an example to us; and in modern times both England and the United States have had experience of the danger of allowing the formation of anomalous groups which are not corporations. The trade union could contend that, because it was not incorporated, it was not legally liable for its misdeeds; and the misdeeds of corporations and trusts tax to the utmost the resources of the federal government. In the interests of public order, we should not allow large numbers of men an unlimited and an unregulated power of grouping themselves for a common object. No doubt it is right that the state should give men freedom to incorporate themselves for lawful purposes. Such groups have the sanction of the state and fall under its code of corporation law. We can allow this larger freedom in modern times because the coercive power of the state is stronger. Maitland, speaking of self-help, has said that "in our own day our law allows an amount of quiet self-help that would have shocked Bracton," because "it has mastered the sort of self-help that is lawless."[1] So we can allow a larger liberty of incorporation because the law, by strongly adhering to the view that incorporation is a privilege granted by the state, is in a position to dictate terms to the groups which it thus allows.

Classification.

The recognition of this incorporate person as a subject of rights and duties raised many legal problems. Not the least was the problem of classifying, in a manner appropriate to this new idea, the incorporate persons recognized by the law. A century before Coke the law was coming to the conclusion that they could be divided into two main groups—corporations aggregate and corporations sole.[2] This was the leading division adopted by Coke,[3] and it became the leading division of the law of the eighteenth century. "Corporations aggregate," says Blackstone,[4] "consist of many persons united together into one society, and are kept up by a perpetual succession of members, so as to continue for ever: of

qu'en vertu d'une concession du legislateur;" the liberty of founding such associations was originally large, but, "plus tard une loi Julia de César ou d'Auguste, dirigée contre les associations politiques ne laissa subsister qu'une partie des anciennes associations . . . et subordonna la création des associations nouvelles à une autorisation prélable."

[1] P. and M. ii 572.
[2] See below 480 n. 3.
[3] Above 470.
[4] Comm. i 457.

which kind are the mayor and commonalty of a city, the head and fellows of a college, the dean and chapter of a cathedral church. Corporations sole consist of one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In this sense the king is a sole corporation: so is a bishop: so are some deans and prebendaries, distinct from their several chapters: so is every parson and vicar."

Corporations aggregate were destined to be by far the most important class of corporations. In the Middle Ages the boroughs were its most important members; and it was through the borough community that the notion of a corporation aggregate came to be distinctly realized by the common law. But the corporation sole or corporations analogous thereto were the oldest variety known to the law; and the conception of a corporation sole came into the common law by way of the church. The process by which this conception was developed by the common law was probably somewhat as follows:—

The fact that the common lawyers were gaining a firm hold upon the conception of a corporation reacted, as Maitland has pointed out, upon those ecclesiastical corporations which had originally introduced these common lawyers to the idea of a *persona ficta*. The corporation is a person. The law knows only persons as the subjects of rights and the objects of gifts. We must drop our talk of gifts to saints and churches. It must be to a person that a conveyance of land is made; and, as the common law will not recognize the interest of one to whose use a conveyance is made, the conveyance must be made directly to a person, real or fictitious.[1] Thus, if a conveyance is to be made to a rector it cannot be made, as of old, to the church, or the saint, or to God; it must be made to the man J.S. who is rector and his successors.[2] But we do not mean to benefit J.S. personally; we mean to benefit the parson of the church of St. X., just as, if we convey land to the abbot and monks of such an abbey, we mean to benefit not the individuals but the house. If we are debarred from saying that we give the land to J.S. to the use of the church, it will appear to be a somewhat obvious alternative to say that J.S., the rector, is a corporation sole.[3] The conveyance is then made to a person, and

[1] L.Q.R. xvi 346, citing Y.BB. 21 Ed. IV. Mich. pl. 32, and 9 Hy. VII. Mich. pl. 6.

[2] Ibid 336, citing Brook, Ab. *Corporations et Capacities* pl. 41.

[3] Maitland (L.Q.R. xvi 336, 337) suggests that Richard Brook, of the Abridgment, who died in 1558, if he was not the true and first inventor of the term "corporation sole," was probably one of the first to apply it to the parson. That some connotation of corporateness attached to the parson even in Edward IV.'s reign would appear in *Pigot's* statement in Y.B. 21 Ed. IV. f. 13; he is explaining that a corporation cannot,

the church is benefited. The alternative was the more obvious because the law recognized many differences between a corporation, like a borough or a chapter, composed of capable persons, and a corporation, like a monastery, composed of one sovereign head and a body of monks who were dead in law.[1] The abbot and his monastery were halfway between the corporation aggregate and the corporation sole; but nearer to the latter than to the former.[2] The rules of law applying to this particular corporation thus paved the way to the recognition by the common law of such a conception as that of the corporation sole.

We shall see that this conception was used to elucidate the position of the king.[3] But we shall see that just as older rules of law, and the course of our political and constitutional history, prevented this device from effecting all that it might have effected in the sphere of constitutional law; so, in the case of the parson, older rules as to the parson's interest in the glebe prevented this application of the doctrine of corporations from being any real use.[4] "We are told that a sole corporation, as a bishop or parson, cannot make a lease to himself, because he cannot be both lessor and lessee. We are told that if a bishop hath lands in both capacities he cannot give or take to or from himself. Those who use such phrases as these show plainly enough that in their opinion there is no second 'person' involved in the cases of which they speak: 'he' is 'himself,' and there is an end of the matter."[5] In the

as a corporation, commit treason or felony, nor can these offences be committed against a corporation "ne vers un parson del Eglise en quant Parscon ou Vicar, car toutz ceux come tielx corps ne puissent tiel tort faire"— so that Brook had at least one authority for his statement; but Brook was evidently inclined to extend this idea—thus he says, Ab. *Corporations et Capacities* pl. 25 that possibly the Chancellor of a University may be regarded as a corporation.

[1] Above 473; Y.B. 5 Hy. VII. Pasch. pl. 7 the reporter tells us that *Brian* "mit diversite entre corps espirituel politique, et corps temporal politique de lour capacite. Come Abbe et Convent sont corps espirituel politique et le Abbe convient a suer et etre sue solement . . . mes en l'autre cas del corps politique et temporal come Dean et Chapiter et Major et Comunalte, ils convient suer et estre sue per lour noms . . . car de tiels corporations chescun du corps est personable in Ley et nemy en l'auter cas;" and for another case in which he drew the same distinction see Y.B. 1 Ed. V. Trin. pl. 10 (p. 5).

[2] Y.B. 20 Ed. III. (R.S.) i 98 Stonore, C.J., said, in answer to an attempt to distinguish the deed of the abbot from that of the house, "I see plainly that you are teaching the Grey Friars how to plead, but you may rest assured that the Abbots of that order used to bear the same seal of their House and to bind the House;" so too in Y.B. 21 Ed. IV. Hil. pl. 9 (p. 76) Vavisor equates a dean, who has sole possession separate from the chapter, with an abbot; cp. also Y.B. 12 Ed. IV. Pasch. pl. 24 (p. 10) *per* Choke, J.

[3] Bk. iv Pt. I. c. 1; Pt. II. c. 6 § 1.

[4] L.Q.R. xvi 346-353; as Maitland says, to carry the theory through, and by its means to give an intelligible account of the parson's relation to his glebe, "would have necessitated a breach with traditional ideas;" so that the idea that the parson is a corporation sole gives us no real help; the corporation sole is a natural man, "and when that man dies the freehold is in abeyance."

[5] Ibid xvi 353, 354; it seems too that no property except realty can go to the successor of the corporation sole, but that other property will go to his executors;

case both of the king and the parson the common law was hampered by the perdurance of old rules which resolutely declined to admit that one man has two capacities. As Sir John Salmond says, the conception of a corporation sole is a perfectly logical conception.[1] It is known to other systems besides our own, and has been used by the legislature at different periods in English legal history.[2] But the doctrine of corporations was new doctrine in the sixteenth century; and corporations sole collided with some very ancient prejudices or limitations which the very precocity of its development had stereotyped in the common law.

We shall now see that these same causes caused other difficulties in the application of this new conception of corporate personality; and that, though the lawyers were beginning to have some ideas as to its nature, they found it by no means an easy task to apply these ideas to the concrete facts of the cases which came before them.

The nature of corporate personality.

The recognition of the existence of an incorporate person necessarily involves the recognition of the three following principles: (i) A corporation is a person distinct from its members; (ii) the property of the corporation is distinct from the property of its members; (iii) the property of its members cannot be taken in execution for the debt of the corporation, and *vice versâ*. We shall now see that these principles gradually gained recognition during the fifteenth century; that, in consequence, the lawyers began to acquire some ideas as to the nature of corporate personality; and that difficult questions were arising as to the effect which matters affecting the natural men composing the corporation could be allowed to have upon the corporation.

(i) In Edward III.'s reign the fact that a corporation is a person distinct from its members had hardly yet been grasped. To a bond given by the mayor and commonalty of Newcastle to John de Denton the report tells us that it was pleaded that John de Denton was then mayor and that a man cannot be bound to himself;[3] and we see a similar confusion in a plea of the year

for this rule the astounding reason is given that the title to chattels cannot be in abeyance—as if the same principle did not apply also to realty, Grant, Corporations 629, 630.

[1] Jurisprudence (2nd ed.) 285.

[2] Grant, Corporations 661, points out that the clerk of the peace was made a quasi-corporation sole by 27 Elizabeth c. 13; and ibid 626, that the Master of Pembroke College, Oxford, was made a corporation sole by letters patent of Charles I. confirmed by 12 Anne Stat. 2 c. 6 § 7; modern examples are the Postmaster-General, 3, 4 Victoria c. 96 § 67; the Secretary of State for War, 18, 19 Victoria c. 117 § 2; the Solicitor to the Treasury, 39, 40 Victoria c. 18 § 1.

[3] Y.B. 17, 18 Ed. III. (R.S.) 70; this seems to be the case referred to in Y.B. 21 Ed. IV. Mich. pl. 4 (p. 15) by Vavisour; neither the Y.B. report nor the roll quite bears out Vavisour's statement as to the plea.

1424, in which it was said that a member of a commonalty could not appear as attorney for that commonalty, since he could not be attorney for himself.[1] So, too, in 1429, to an action of trespass brought against the corporation of Ipswich and one J. Jabe, it was pleaded that J. Jabe was a member of the corporation and was therefore twice named.[2] But the argument in the last cited case shows us that the fallacy was then perceived by, at any rate, some of the lawyers.[3] Indeed, this distinction between the corporation and its members was an essential part of the canon law theory, and had been applied by the common lawyers to ecclesiastical corporations as early as Edward III.'s reign.[4] In the latter part of the fourteenth and the beginning of the fifteenth centuries, the practice grew up of dropping the word "heirs" in a grant to a corporate body, and of substituting therefor the word "successors;"[5] and in Henry VI.'s reign it was held that a fee simple could be conveyed to it without that word.[6] In 1480 this capacity to take by succession was put forward as the distinctive mark of a corporation. If a gift were made to an individual (even though he was an individual holding an office) and his successors, the successors could not take, but it would go on his death to his executors.[7] This reasoning is an additional proof that the corporation was coming to be regarded as a distinct body, separate and of another nature from the men who composed it.

(ii) It is clear, even in Edward III.'s reign, that a corporate

[1] Y.B. 3 Hy. VI. Pasch. pl. 16.

[2] Y.B. 8 Hy. VI. Mich. pl. 2 and pl. 34; this case is cited P. and M. i 476.

[3] Ibid at p. 15, "Le trespass est fait par les Bailies et le Commonalty et J. que sont ii, mesque J. soit un de eux, car un de le Commonalty n'est le Commonalty, mes aggregatum ex omnibus est le Commonalty," *per* Rolf; and ibid at p. 1, Paston, J., points out the practical injustice of taking the opposite view, "Si J. fist le tort a nous de son teste demesne, et nemy come un de Commonalty ensemble ove le Commonalty et jeo suis mis a tiel brief come vous parlez, et jeo avois jugement de recoverer damages, jamais n'aurai execution si non des biens le Commonalty, et nemy des biens singulaires;" Y.B. 5 Hy. VII. Pasch. pl. 7 Brian puts the case of the man who could sue his own executor, "Si un home est oblige a un Abbe, et puis il entre in Religion en meme le Meason a qui il est debtor, et puis il est fait Abbe," the debt is not extinguished on the ground that the same person is debtor and creditor, but "il aura action de Debte envers ses executors demesne."

[4] 17 Ass. pl. 29, "Le Prior pleda en barre per release del Dean et Chapter de B dont le pleintiff se pleint come Treasurer, a quel temps le pleintiff mesme fuit un del Chapter et *non allocatur per Shard;* pur ceo que le pleintiff demande de son several droit severe de Chapter;" S.C., Y.B. 18, 19 Ed. III. (R.S.) 74; and the distinction emerges still more clearly in a case of 39 Ed. III.: "Alien nee est fait prior dun meason et port action, il n'est ple que est alien nee . . . car il port l'action come prior in jure domus et non in jure proprio," Bro. Ab. *Denizen* pl. 15.

[5] Y.B. 16 Ed. III. (R.S.) i xliv, lxxxiv-lxxxv.

[6] Y.B. 39 Hy. VI. Mich. pl. 17 (p. 13) *per* Littleton; cp. Y.B. 20 Hy. VI. Mich. pl. 16 (pp. 6, 7).

[7] "Si un home soit oblige a le Dean de Pauls et a ses successors, et le Dean devy, le successor n'aura my l'action, mes ses executors, car il n'ad my succession per tiel nosme, mes si home soit oblige a Dean et Chapiter de Pauls et a lour successors, la le successor avera l'action, et nemy l'executor," Y.B. 20 Ed. IV. Pasch. pl. 7 *per* Littleton.

body can own property which is not the property of its individual members.[1] In one of the last of the books of Assizes it is this capacity of the corporation to own property which is put before us as the characteristic which distinguishes a corporate from an unincorporate body;[2] and the fact that this property is distinct from the property of the individuals who compose the corporation was clearly stated several times during the fifteenth century.[3]

(iii) As to whether the private property of the members of the corporation could be taken in execution on a judgment against the corporation was discussed in 1429.[4] It was argued that such property might be taken because the king took the property of individuals if a community, such as a county or hundred, were amerced. The reply was that one cannot argue from the king's case to that of a common person. In fact, it was just this rule which brought out the difference between the modern corporation and the old unincorporate group; and it was held in 1440[5] and in 1442[6] that on a judgment against a corporation only the corporation goods could be taken.

When the law had arrived at these results it had got some way towards a recognition of the incorporate person. We find, therefore, in the Year Books of Henry VI.'s and Edward IV.'s reigns—more especially in the Abbot of Hulme's case[7]—much speculation as to its nature. It was said to be invisible, of no substance, a mere name, and yet a person.[8] That it was immortal had been clearly seen in Richard II.'s reign when the mortmain laws had been extended to these lay corporations.[9] It followed from its nature that it could not be outlawed[10] or excommunicated;[11] that it could not be assaulted or imprisoned;[12] that it

[1] 17 Ass. pl. 29.

[2] 49 Ass. pl. 8, "Il ne puit estre per Ley que ce Comminalty de la Gild, que n'est affirm par chartre le Roy, purroit estre adjudge un corps de purchaser estat de frank tenure," *per* Knyvet.

[3] Y.BB. 8 Hy. VI. Mich. pl. 2, "Singulaires ne sont les biens del Commonalty," *per* Strange; 19 Hy. VI. Pasch. pl. 1 (p. 64) *per* Markham; 21 Ed. IV. Pasch. pl. 22 *per* Choke.

[4] Y.B. 8 Hy. VI. Mich. pl. 2.

[5] Y.B. 19 Hy. VI. Pasch. pl. 1 (p. 64) *per* Markham.

[6] Y.B. 20 Hy. VI. Mich. pl. 19 *per* Fortescue.

[7] This case appears four times in Y.B. 21 Ed. IV. Pasch. pl. 21, Mich. pl. 4, Pasch. pl. 22, Mich. pl. 53, at pp. 7, 12, 27, 67; the abbot sued the mayor and commonalty of Norwich on a bond; the plea was that the abbot had got the bond executed by imprisoning the mayor; and the question to be decided was whether this was a good plea.

[8] Y.B. 21 Ed. IV. f. 13, "Le corporacion de eux n'est q'un nosme que ne poit my estre view, et n'est my substance," *per* Pigot; Y.B. 32 Hy. VI. Mich. pl. 13 (f. 9). cited P. and M. i 474 n. 5, "Ils sont per cest nosme un person corporate."

[9] Vol. ii 475.

[10] 22 Ass. pl. 67; Y.BB. 45 Ed. III. Hil. pl. 5; 21 Ed. IV. pp. 13, 14.

[11] Y.B. 21 Ed. IV. p. 14 *per* Choke.

[12] Ibid pp. 13, 14.

could not commit treason or felony;[1] and that, according to some of the canonists, it could not commit a sin or a delict.[2]

But, when these theoretical attributes of the incorporate person came to be applied to its activities in the world of fact, some difficult questions arose. In the first place, certain cases raised the question how far, if at all, matters affecting individual members of the corporate body affected the validity of corporate acts. In the second place, other cases showed that the older ideas, which had diminished the usefulness of the conception of a corporation sole,[3] operated in certain cases to prevent an entirely logical development of the conception of the corporate personality of a corporation aggregate.

(i) In two cases of Edward IV.'s reign the question arose whether duress to the members of a corporate body would avoid a corporate act. In 1476 to an action of debt against an abbot and convent upon a bond sealed with their corporate seal, it was pleaded that the abbot's predecessor compelled his monks to execute the deed by duress.[4] This was held to be no plea. Brian, C.J., held that the corporation was not menaced because all the individual monks were menaced;[5] and Littleton, J., held that if the abbot and the majority of the convent agreed, the mere fact that they had menaced the minority was no cause to avoid the deed.[6] Brian's view was perhaps the strictly logical view; but Littleton's view was the more practical view, as, on the strictly logical view, it is obvious that a corporation could never set aside a deed to which it had put its seal under the influence of duress applied to all its members. This was recognized by Brian in 1481 in the Abbot of Hulme's case. "As to what is said by my Lord Choke that if an action is brought against a corporate body by the name of the Commonalty only, it is no plea to say that one of the Commonalty was in prison, that is good law; but if the greater part of them be imprisoned, then it is a good plea. And if the greater part agree to the making of a deed, it is good; for if they are not able to do anything until they are all of one mind, peradventure they may never come to an agreement; and for that reason *ubi major pars ibi tota.* And when it is said that such a

[1] Y.B. 21 Ed. IV. p. 13 *per* Pigot; ibid p. 14 *per* Catesby.

[2] Political Theories of the Middle Age xix; cp. Y.B. 15 Ed. IV. Mich. pl. 2 *per* Brian; below 488.

[3] Above 481-482.

[4] 15 Ed. IV. Mich. pl. 2, summarized by Pollock, L.Q.R. xxvii 233.

[5] "Nient obstant que touts les moignes de le dit meason fueront manasses uncore il n'ad allege que covent fuit manasse, et aussi un covent ne poit my estre manasse ne en prison, car c'est jus corporale" [*qu.* incorporale].

[6] "Si l'Abbe et le greindre part de les commoignes ove lour bon volunte font un obligation et le meinder part de les commoignes soit enprisones, son successor ne voidera cel fait per reason del enprisonment de meinder part de les commoignes."

body cannot be severed, that is not so; for if the mayor dies they are severed, and when a new mayor is made the corporation is as it was before; and for such things as are done by the body politic there must be consent, that is of natural men and private persons; for this body incorporated under the name of mayor sheriff and commons cannot as a corporate body consent, but the consent must be the consent of the particular persons to the deed or another act; for if this body wishes to do anything it must be in writing; and then how shall this writing be made? Clearly by the consent of each particular person. And as to the argument that he (the mayor) was in prison as a private person, that is not so, for, for such imprisonment, the body corporate will have a writ false imprisonment."[1] The same principle was also recognized when it was held in the same year by all the judges except Fairfax, that the fact that a juror in an action brought by a dean and chapter was brother to one of the canons was a good cause of challenge.[2]

(ii) Though a corporation aggregate was recognized as a continuing person which had a perpetual existence, the lawyers could not wholly separate it from accidents in the life of the natural man who was at its head, any more than they could separate the corporation sole from the natural man of whom it consisted.[3] Thus Brian, C.J., held that if a mayor was outlawed, or if there was a vacancy of the office, at the time of doing an act, that fact would be a good answer to an action by his successor based on that act;[4] it was held by Broke, J.,[5] and Brudnel, C.J.,[6] that a dean and chapter could not present the dean to a living, for no man could present himself; and Littleton laid it down that during the vacancy of the headship of a monastery the monastery was capable of no corporate act.[7] This is intelligible as applied to a monastery, for the monks were dead persons in the law; but it was applied to corporations of capable persons, such as deans and chapters or colleges.[8] It followed from this rule that a devise or a grant to a corporation during the vacancy of the headship was void,[9] so that the mayor or the head of a college could not himself devise to the corporation.[10] No doubt these rules can be explained by saying that an incomplete corporation is incapable of corporate action; and as so explained they are consistent with the view that the personality of the corporation is wholly distinct

[1] Y.B. 21 Ed. IV. Mich. pl. 53 (p. 70).
[2] Y.B. 21 Ed. IV. Mich. pl. 33 (p. 63); cp. Pollock, L.Q.R. xxvii 234-235.
[3] Above 481-482. [4] Y.B. 12 Ed. IV. Pasch. pl. 24.
[5] Y.B. 13 Hy. VIII. Pasch. pl. 2 (p. 13).
[6] Y.B. 14 Hy. VIII. Pasch. pl. 2 (pp. 30-31).
[7] § 443. [8] Co. Litt. 263b. [9] Ibid 246a.
[10] Corpus Christi College Case (1587) 4 Leo. 223; S.C. Dalison 31; Grant, Corporations (ed. 1850) 123; Maitland, Coll. Papers, iii 221 n. 3.

from that of its members. But they far more probably originated in a confusion between the corporation and the natural man at its head. This is illustrated by other cognate rules which are clearly based on this confusion. Thus Prisot, C.J., held that if an abbot, prior, dean, or master was suing on some cause of action arising in the time of his predecessor, he must show how he came to be made the head of the corporation, just as a natural person, claiming e.g. as executor or heir, would be obliged to show his title to sue in such a capacity;[1] and some thought that if a corporation consisting of mayor and aldermen were suing, it must be shown who was mayor when the charter of incorporation was granted.[2] Similarly, Coke cites a case of 1597[3] in which it was laid down that, if a dean and chapter made a lease which was void as being contrary to the provisions of an Act of 1571,[4] the lease was not "utterly void presently according to the express letter of the Act," but was only voidable after the death of the dean who was party to the lease.[5]

It would seem therefore that, though the lawyers had arrived at one or two general ideas as to the nature of corporate personality, they had found considerable difficulty in applying these general ideas to the concrete facts of individual cases. This difficulty had arisen partly from the facts of these cases, and partly from the survival of older ideas which were natural to a period in which the conception of corporate personality was new. Both these causes affected the subsequent development of the law. They tended to a development of the law which will prevent it from attaining any very clear or logical conception of corporate personality, because it will lead to the creation of a number of particular rules regulating the various activities of different kinds of corporate bodies. But this we shall see more clearly in the following section.

Powers, capacities and liabilities.

So soon as the law had arrived at the conception of an incorporate person the question of the powers, capacities and liabilities of such a person arose. We have seen that certain powers, capacities and liabilities affecting the natural man were obviously ruled out by the nature of the corporate personality. On the

[1] Y.B. 34 Hy. VI. Mich. pl. 6.
[2] Y.B. 13 Ed. IV. Pasch. pl. 4.
[3] 3 Co. Rep. at f. 60a.
[4] 13 Elizabeth c. 10.
[5] "As the Act was made for the benefit of the successors, that the lease should not be void till after the death of the dean, who was party to the lease: and although the successor of the dean is not successor to the whole corporation who made the lease, but only the principal member of it; yet because the whole corporation never dies, such lease, by construction, shall be void after the death of the dean, who is the principal member of the corporation, and his successor, with the chapter, shall avoid it"; cp. the rules as to forfeiture Hale, P.C. i 252; Royal Hist. Soc. 3rd Ser, xi 117-118.

other hand, other powers, capacities and liabilities—a power to own property, to contract, to sue and be sued, liability on contract, or for wrongs done as the owner of property—were as obviously included. The main difficulty then and now was and is to endow this corporate person with a capacity for doing acts and incurring liabilities which will not hamper its freedom of action, and will adjust satisfactorily its relations to its neighbours.

Even at this early period of our legal history it is clear that a consideration of the abstract character of this incorporate person was beginning to create theoretical difficulties as to its capacities and liabilities. In 1476[1] Brian, C.J., laid it down that "a man shall not have a writ of trespass against an abbot and convent because the convent cannot commit trespass; no more shall a man have a writ of trespass against a mayor or commonalty—which was admitted by the whole court." If Brian (as is most probable) was referring to trespasses to the person, this statement is not only true but obvious. But the broad way in which the law was laid down indicates a line of thought which will long tend to restrict the delictual capacity of corporations, and has had some effect upon determining the powers and capacities of corporations in other directions.[2] During this period it was only just beginning to be developed; and even at this period it is clear that the law on this subject was being constructed rather by considerations of expediency which emerged from the discussion of individual cases, than by any attempt to work out logically deductions drawn from the nature of corporate personality. Let us look at one or two illustrations.

Though some of the canonists had laid it down that a corporation cannot commit a delict,[3] though its capacity for delictual liability was clearly restricted in certain directions;[4] the common lawyers found no difficulty in making it liable for certain kinds of wrong-doing. We have seen that delictual liability was founded upon an act contrary to law which caused damage to another;[5] and the common lawyers agreed that for such acts which caused damage to the person or property of another a corporation was liable.[6] Again, being a person which owned property, it could suffer delicts in respect of that property.[7] It could also deal with that property, and for that purpose make conveyances or contracts; and it could be made liable, if through its servants

[1] Y.B. 15 Ed. IV. Mich. pl. 2; see L.Q.R. xxvii 233 for Sir F. Pollock's explanation of this passage.
[2] Bk. iv. Pt. II. c. 6 § 2.
[3] Above 474. [4] Above 484-485. [5] Above 375-377.
[6] Y.BB. 45 Ed. III. Hil. pl. 5; 46 Ed. III. Mich. pl. 7; 8 Hy. VI. Mich. pl. 2; 32 Hy. VI. Mich. pl. 13.
[7] Y.B. 21 Ed. IV. pp. 13, 14 *per* Brian, C.J.

damage was caused to another by breach of contract.[1] Gradually the rule that the consent of the corporation to be bound can only be evidenced by its seal hardened into a fixed rule of law.[2] But the exceptions, (i) that a corporation which has had the benefit of property must pay for it, though there is no contract under seal,[3] and (ii) that for small everyday matters the seal need not be used,[4] seem almost contemporary with the establishment of the principal rule. Indeed the first exception may be older than the principal rule in its final form—a survival from the days when the idea of a *persona ficta* was as yet ungrasped. As yet the law on all these points is meagre; but we shall see that it is from these decisions that the later common law rules were developed.

Dissolution.

We have seen that one of the most marked distinctions between an incorporate and a natural person was the fact that the incorporate person was not subject to death or other weaknesses which affect the natural man.[5] But, for all that, it was beginning to be apparent that it was liable to dissolution and other casualties which could be compared to death or other incapacities by which natural men are affected. Thus it was laid down in 1441 that if all the members of a corporation perished the corporation was dissolved;[6] and if, as the result of proceedings on a *scire facias*, its charter was revoked or modified, it necessarily disappeared or altered its character.[7] Similarly, its life might be suspended or perhaps destroyed as the result of proceedings on a writ of *quo*

[1] Y.B. 48 Ed. III. Trin. pl. 2 *per* Belknap.

[2] Y.B. 22 Hy. VI. Mich. pl. 6; Longo Quinto 43; Y.B. 21 Ed. IV. Hil. pl. 9 a distinction is again drawn between the case of the abbot or the sole dean and other corporate bodies; a lease by them, though not under seal, holds good for their term of office; but it is otherwise of a corporation aggregate like a borough or chapter; the growing importance of the latter class of corporations tended to make the rule a fixed general rule of law.

[3] Above 473.

[4] Y.BB. 4 Hy. VII. Pasch. pl. 2, "Est diversite parenter tiels choses qui sont occupies chescun jour et auters," *per* Townsend; 7 Hy. VII. Hil. pl. 2, "Il ne requiert avoir fait a chescun petit chose," *per* Tremaile.

[5] Above 484.

[6] "*Brown*.—Et mesques touts les Moines meurent en cest Abbey a un temps, uncore auters puront estre profess; en quel cas le rent tout temps demeuront. *Paston*.—Certes ceo ne puisent sans novel creation. *Ad quod concordat Newton*," Y.B. 20 Hy. VI. Mich. pl. 7 (p. 8); we shall see that this view prevailed, though in Y.B. 7 Ed. IV. Trin. pl. 2 (p. 12) Danby, differing from Choke, was of the same opinion as Brown.

[7] See Y.B. 15 Ed. IV. Mich. pl. 12 (p. 7) *per* Collow and Fincham, *arg.*; Basset v. Corporation of Torington (1568) Dyer 276a was a case of a scire facias to repeal a grant of a market to the corporation; and in a similar case of 1571, reported in Moore 327, the judges seemed to think that the whole charter might be repealed; there does not seem to be any mediæval precedent for the repeal of a charter of incorporation by scire facias, Grant, Corporations (ed. 1850) 40 n. (*s*); whether a charter creating a corporation could be forfeited by any means was one of the points argued in the proceedings against the City of London in 1682, Bk. iv. Pt. II. c. 6 § 2,

warranto;[1] and we have seen that the death or removal of its head reduced it to a condition of suspended animation, which had an effect upon its capacity somewhat analogous to the effect of a minority upon the capacity of a natural man.[2] What would happen to its property in case of dissolution is by no means clear. No rule seems as yet to have emerged as to chattels; but in the case of land the rule, which has ultimately prevailed, that the donor who gave the land could re-enter, was laid down in Edward IV.'s reign.[3] Up to that time it was doubtful whether in such a case the donor could re-enter or whether the land escheated.[4] Gray has pointed out that the view of those who held that the land escheated was the more logical;[5] and he is probably right in thinking that the opposite view was derived from a consideration of cases where the land, being held in frankalmoin, was necessarily held of the donor;[6] so that whether it escheated or not the donor would get it.[7] But on all these matters we can see little more than the germs of the modern rules.

It is thus clear that, by the end of the mediæval period, the conception of an incorporate person has been introduced into the common law. The law has acquired some general ideas as to the nature of such a person; and from these general ideas certain concrete rules have been deduced which are the basis of the rules of the modern common law. But we can see that the main body of the law will be constructed, not by the method of deducing rules from the nature of corporate personality, but by the much more practical method of regulating in detail the activities of these corporations as and when questions as to their powers, capacities and liabilities come before the courts. In this period, therefore, both the foundation of the modern rules and the mode of the future development of this branch of the law are foreshadowed. Of the way in which the modern law was developed on this basis I shall speak in subsequent Books of this History.

[1] See cases from the P.Q.W. cited Grant, Corporations 297; for these placita see vol. i 88; for the later history of the procedure by quo warranto see Bk. iv. Pt. II. c. 6 § 2.

[2] Above 486-487; for the effect of minority see below 513.

[3] Y.BB. 7 Ed. IV. Trin. pl. 2 (p. 12) *per* Choke; 11 Ed. IV. Trin. pl. 7 *per* Choke.

[4] In Y.B. 9 Ed. III. Trin. pl. 24 (p. 26) Hill and Schardelowe favour the view that the property escheats; and the same view seems to have been held by Littleton, Y.B. 35 Hy. VI. Pasch. pl. 2 (pp. 56-57); Bro. Ab. *Corporations* pl. 78 vouches Y.B. 20 Hy. VI. Mich. pl. 7 for the rule that the land escheats, but the printed Y.B. does not bear this out.

[5] Perpetuities (2nd ed.) 43-47.

[6] Above 36-37.

[7] Perpetuities 45-46; it may be noted that in Y.B. 12 Ed. IV. Pasch. pl. 7 (p. 3) Catesby states the rule as applicable to land held in frankalmoin—"si jeo done terre a un Abbe en frankalmoigne, si touts les moignes devient, jeo avera la terre."

§ 3. The Villein[1]

The villeins were a composite class. They were made up of those slaves which were known to the Anglo-Saxon law and of those free yet dependent cultivators of the soil whose tenure was defined by the Norman lawyers to be unfree. These diverse classes were thrown together by the Norman and Angevin lawyers and classed as villeins; and under the influence of conceptions borrowed from Roman law many of the rules and maxims of the Roman conception of slavery were applied to them. Their lord had absolute power over their bodies and their goods. He could sell them and treat them as he pleased; for they were his chattels. They were all equally things—"there are no degrees of personal unfreedom."[2] The Dialogus de Scaccario, Glanvil, Bracton, Britton, and Fleta all hold the theory.[3] But it was a theory which fitted in very badly (1) with the facts of English life, (2) with the principles of English law, public and private, and (3) with the leaning in favour of liberty which was constantly proclaimed by the king's judges from the earliest period. Consequently the general theory with which the law started was modified in every direction, with the result that the status of the villein became one of the greatest curiosities of the mediæval common law.

(1) The theory of the lawyers fitted in very badly with the facts of English life. The villein was the inhabitant of the manor, who held his land on the terms of performing various agricultural services. In some cases he was the descendant of the Anglo-Saxon theow; but in many cases he was the descendant of the dependent yet personally free ceorl.[4] The Mirror of Justices considered it an abuse that all these persons should be considered personally unfree; and in this instance the Mirror may well have preserved an old tradition.[5] He held a plot

[1] The chief authorities are Vinogradoff, Villeinage; P. and M. i 395-415; Maitland, History of a Cambridgeshire Manor, E.H.R. ix 417-439; Davenport, Development of a Norfolk Manor; Leadam, articles in Royal Hist. Soc. Tr. N.S. vi and viii; E.H.R. viii 684; L.Q.R. ix 348; and the cases and introductions in Select Cases in the Court of Requests (S.S.), and Select Cases in the Court of Star Chamber (S.S.); Savine, Bondmen under the Tudors, Royal Hist. Soc. Tr. N.S. xvii 235 seqq.

[2] P. and M. i 396; for the meaning of the terms "villein regardant" and "in gross," which were at one time supposed erroneously to denote degrees of personal unfreedom, see note at the end of this section.

[3] See references in Vinogradoff, Villeinage 44, 45; Dialogus II. x, "Cum enim ascriptitiorum dominis liberum sit, non solum illos transferre, verum etiam quibuscunque modis distrahere, sicut supra dictum est; et non tantem catallorum sed et corporum merito domini reputentur."

[4] Vol. ii 42-43, 167, 202, 264-265.

[5] At p. 80; and cp. Leadam, Tr. Royal Hist. Soc. N.S. vi 195, and Select Cases in the Court of Star Chamber (S.S.) cxxvii, cxxviii,

of land of his own, and made his living out of it. In fact, he was of little use apart from his tenement; and though the lord could change his tenement as he pleased, he could make little profit of him unless he employed him upon the land and gave him a home.[1] It is for this reason that we hear very little of sales of villeins apart from the land. No doubt the lord could so sell them if he pleased, and sometimes did so.[2] But economic causes prevented the existence of anything like a market for villeins; and this fact alone, whatever might be the theories of the lawyers, fixed a great gulf between the villein and the slave.[3] Living thus in the manor the villein was protected (i) by the growing fixity of the custom of the manor which defined his duties and his lord's rights, and (ii) by the communal character of the manorial organization, which preserved the memory of the time when such communities were composed of the personally free.[4] We have seen that the manor through its court was capable of very varied activities—even of agreements with the lord;[5] and that court was often composed of villeins. The atmosphere of legality which we see in the manorial courts made transactions between lord and villein seem very natural. But if the theory as to the villein's status held by the royal courts was adopted, these transactions were legally impossible. The lawyers could save their theory only by adopting one or other of two courses. They might decline to recognize these transactions, or they might say that the fact that they were entered into operated as an implied manumission. They chose the latter alternative because, as we shall see, it was more convenient, and more consonant with other principles of the common law.[6] The result was that a gift to a villein by his lord of an estate of inheritance,[7] pleading with one's villein in court as if he were free,[7] perhaps appointing him as attorney for litigation in a court of record,[8] and, after

[1] The Mirror (S.S.) 165 tried to represent that the lord's right to his serf was conditional on his providing sustenance. Leadam thinks that there was a continuous legal tradition to this effect, Select Pleas in the Star Chamber (S.S.) cxxviii—but he hardly proves his point; see above 30 nn. 8-10.

[2] P. and M. i 397 n. 2, and Madox, Form. nos. 755, 763-765; Y.B. 21 Ed. IV. Pasch. pl. 13 we have an instance of a lease of a villein for a term of years; see Madox, Form. nos. 302, 315, 410, 440 for sales of land with villeins.

[3] Vinogradoff, Villeinage 151-153.

[4] Vol. ii 376-377.

[5] Ibid 377; cp. E.H.R. xxxvii 409-413.

[6] Bracton ff. 24b, 208b seems to think that an agreement might be made with a villein; but this was not the view which prevailed, Litt. §§ 205-207; cp. P. and M. i 401; Vinogradoff, Villeinage 70-74; above 418 n. 7.

[7] P. and M. i 410; Y.BB. 20, 21 Ed. I. (R.S.) 374; 21, 22 Ed. I. (R.S.) 8; 32, 33 Ed. I. (R.S.) 240; 14, 15 Ed. III. (R.S.) 48—vouching a villein to warranty; but cp. 18 Ed. III. (R.S.) at p. 122 where the opinion is expressed that he could be vouched, with a saving of the "servitude." Note the opinion of Inge, J., in Y.B. 6, 7 Ed. II. (S.S.) 202 that it was only a feoffment "to hold by homage" that would enfranchise the villein; this view does not seem to have been followed.

[8] Y.B. 4 Ed. II. (S.S.) 130—but the reporter questioned this rule,

a little hesitation, making a covenant with him—all operated as manumissions. It was therefore very dangerous for a lord either to litigate or to have any business dealings with his villein, and he found but a poor set off in the converse rule that an admission by a villein in court that he was a villein was conclusive as to servile status.[1]

The theory of the lawyers, which threw together into the class of the personally unfree the majority of the humbler cultivators of the soil, had ignored the fact that many of these persons were personally free; and facts revenged themselves upon such a theory. The lawyers were obliged to reintroduce a distinction which they had ignored by distinguishing sharply unfreedom of status from unfreedom of tenure,[2] because it was quite obvious that many were holding by a tenure classified as unfree whose status could not only not be proved to be unfree, but could even be proved to be free. The necessity of drawing this distinction, which it was difficult to maintain in practice, was really a consequence of trying to impose too simple—too Roman—a classification upon the complex elements of which the humbler classes of English society were composed. Though the condition of the former freemen was depressed by the theory of the lawyers, the condition of the former slaves was raised. Both were thrown together into one class. As a matter of fact, in the daily life of the manor it made little difference whether the status or the tenure or both were unfree; for, as we have seen, the fixed customs and communal life of the manor regulated the lives of all who dwelt therein.

(2) The theory of the lawyers fitted in very badly with the principles of English law, public and private. We have seen that the local government of the country was carried on through the agency of the communities of the land. Many whose status was unfree were obliged to serve in leet, tourn, and hundred court, and to act as jurors. They must possess the arms required by the Assize of Arms and the Statute of Winchester. They must turn out to assist the sheriff to keep the peace. They were liable to pay taxes with free persons on any movables which they possessed. "The state has a direct claim upon their bodies, their goods, their time, and their testimony."[3] The lord could imprison and beat

[1] Y.BB. 20, 21 Ed. I. (R.S.) 40; 19 Hy. VI. Mich. pl. 65 "*Newton* dit a les tesmoignes, Come prochein estes vous del sang del defendant? et ils mirerent que ils furerent ses oncles. *Newton*.—Estes vous villeins al pleintif auxi? Qui disent, Ouy. Donc dit *Newton*, Coment que vous ussies etre franc devant cest jour, par cest conisance devant nous, vous avez lie vous et vos heires de votre corps a villeinage a toujours."

[2] Vol. ii 202, 264, 577.

[3] P. and M. i 404, 405; see ibid 405 n. 1 as to the extension of the provisions of the Assize of Arms to villeins.

his villein; and in practice this may have led to a good deal of oppression in particular cases.[1] But against grosser forms of personal violence he was protected by the criminal law.[2] The peace must be kept; and this exception to the absolute character of the lord's rights could be justified by the rescript of Antoninus, which laid it down that the master must not grossly illtreat his slave, because it was for the public interest to see that no one made a bad use even of his own property.[3] Conversely, in the public interest he must be punished as a freeman if he committed crimes; and if he was attainted of felony, the king and not the lord took his chattels.[4] To allow his lord sole jurisdiction over him would be to establish again those private jurisdictions the limitation of which was the condition precedent of the life of royal justice and the common law.[5] We may note, too, that the rights of the king and of the church sometimes conflicted with the rights of the lord, and operated to confer freedom. A man who had lived in a borough or on the king's demesne for a year and a day became free, unless he acknowledged his lord's rights by paying a sum called *chevagium*. Similarly, a man who had entered religion was free unless and until he resumed a secular life.[6] All these various rules of public or constitutional law were thus, in their different ways, wholly opposed to the theory that a villein was a slave.

The theory was opposed no less to certain fundamental principles of private law, which, in their origin, were closely connected with some of these principles of public law. We have seen that the principle that the peace must be kept and self-help prohibited, led the common lawyers of the thirteenth century to protect by rapid and effective remedies any de facto seisin.[7] We have seen that many incorporeal things were then regarded as being the subjects of seisin. Among these things was the valuable right of liberty. "In Bracton's day a serf who fled had to be captured within four days, otherwise he could not be captured unless within year and day he returned to his "villein nest:" a parallel rule gave the ejected landholder but four days for self-help."[8] We shall see that the courts placed a very heavy burden of proof upon the lord who was obliged to use legal process to recapture his

[1] Y.B. 6, 7 Ed. II. (S.S.) 201-203 and liv-lv; cp. Y.B. 6 Ed. II. (S.S.) 151-152.
[2] See Bills in Eyre (S.S.) no. 40, and Mr. Bolland's comment Introd. lix.
[3] P. and M. i 393, 399 and references there cited.
[4] The Eyre of Kent (S.S.) i 141.
[5] Vinogradoff, Villeinage 64, 65; and see Y.B. 30, 31 Ed. I. (R.S.) 536; vol. ii 202, 272.
[6] P. and M. i 412; as to chevagium see Vinogradoff, op. cit. 157; he seems to give a somewhat different definition in E.H.R. xv 778; but as to this see Savine, Royal Hist. Soc. Tr. xvii 266 n. 1.
[7] Above 9.
[8] P. and M. i 401. The expression "villein nest" occurs in Y.BB. 21, 22 Ed. I. (R.S.) 449; 33-35 Ed. I. (R.S.) 205; 1, 2 Ed. II. (S.S.) 11.

villein.[1] Thus, as Sir Paul Vinogradoff has said, "it was sufficient to cross a brook or to remove to a neighbouring borough to secure preliminary protection, and often to sever the tie binding a man to his villein's nest for ever."[2] This application to the law of villein status of the principles applied to seisin was followed out in detail in other directions; and it is mainly on account of the manner in which it was thus followed out that the great characteristic contrast between mediæval villeinage and Roman slavery was reached. We have seen that, as the result of the doctrine of seisin in property law, the common law knew no such thing as absolute dominium: all it knew was a variety of rights to seisin, older and better, or younger or weaker, relatively good and relatively bad, but all alike entitling the person de facto seised to the rights of ownership.[3] Now if we apply these doctrines to the seisin by the lord of his villein on the one side, and to the seisin by the escaped villein of his liberty on the other, we shall find that they will result in the doctrine that though the villein *qua* his lord is rightless or nearly so, *qua* all the rest of the world he must be regarded as free. In other words, villeinage is the relation of a person to his lord: it is not, like slavery, a condition of rightlessness as against the world at large. As against the lord who is seised of him the villein has no property, and can bring no action if assaulted or imprisoned. As against the rest of the world, who are not seised of him, the villein himself is seised of his freedom, and can act as a free man.[4] This sometimes led to curious results. A villein could sue any third person as if he were free, but if he were sued he might reply that he was X's villein and owned no property, and the action was dismissed.[5] This rule was probably modified in the case of the personal actions, but it remained in the case of the real actions.[6] But even in the case of the personal actions the plaintiff who recovered was in a precarious position. The lord might intervene and claim all the villein's chattels as his own.[7] It is not uncommon to find that the villein who has been condemned to pay fines in the ecclesiastical courts is punished by the lord for wasting what are really the lord's goods.[8]

The result was to give the villein in some events a privileged position. He could sue, but could evade being sued. This opened

[1] Below 498-499.
[2] E.H.R. xv 778, 779; and cp. P. and M. i 414, 415.
[3] Above 91.
[4] Vinogradoff, Villeinage 67-69; P. and M. i 412, 413.
[5] Y.BB. 32, 33 Ed. I. (R.S.) 240; 17, 18 Ed. III. (R.S.) 152; Britton ii 159, 168, 169; the plea could not be contradicted till 37 Edward III. c. 17 altered the law; it is obvious that the rule was being made use of for purposes of fraud, see Fitz., Ab. *Briefe* pl. 322, cited P. and M. i 408 n. 3—a man may confess himself villein to his father and get a release the next day; and cp. Y.BB. 15 Ed. III. (R.S.) 338; 18, 19 Ed. III. (R.S.) xxxv-xxxvi; Vinogradoff, Growth of the Manor 344.
[6] P. and M. i 403. [7] Ibid 404. [8] Vol. ii 381.

the door to abuse and collusion. We have seen that the later part of the mediæval period was characterized by litigiousness and by a readiness to take advantage of every shift provided by an elaborate procedure. Much could be done to stop or impede an action by a plea of villeinage.[1] These opportunities were not let slip; and we shall see that it was the abuse of this and other technical rules which had indirectly something to do with the long continuance and the ultimate disappearance of the status.[2] Here we need only note that these abuses were rendered possible by the peculiar status of the villein; and that that status was the logical consequence partly of the rules of public and criminal law, which in the public interest treated him in all respects as a free man, and partly of the rules of private law, which was almost compelled by its own principles to allow that he was seised of freedom as against all save his lord.

(3) The theory of the lawyers was opposed to that leaning in favour of liberty which was professed by all, and more especially by the lawyers themselves. That the condition of serfdom was coming to be considered hard we can see from the words which Chaucer puts into the mouth of his Parson.[3] A lord, ever since the days of Bracton, could, as we have seen, manumit his villeins by charter;[4] but such manumissions were generally made in consideration of a money payment.[5] They were favoured by the courts; but, after all, they were occasional,[6] and hardly affect, if they do not illustrate, the legal theory of villeinage. The lord when he manumits is disposing of his own property.[7] It is in the doctrines of the lawyers that we get the strongest statements in favour of liberty; and these doctrines may well have helped to form a public opinion adverse to the continuance of the status. We get a good idea of the general principle adopted by the lawyers

[1] Vol. ii 459 nn. 3, 4. [2] Below 502-505.

[3] The Parson's Tale (cited by Leadam, Select Cases in the Star Chamber (S.S.) cxxv). Those are condemned who "taken of here bondmen amerciments, whiche mighte more resonably ben cleped extorcions than amerciments. Of whiche amerciments and raunsoninge of bondemen some lordes stywardes seyn that it is rightful, for as much as a cherl hath no temporel thing that it ne is his lordes, as they seyn. But certes, thise lordeshipes doon wrong that bireven hir bondefolk thinges that they never yave them;" for a hard case of this kind in 1435 see History of Castle Combe 223, 225.

[4] Vol. ii 202 n. 1

[5] The difficulty that a villein, being capable of owning no property, could not buy his manumission was got over by the intervention of a third person to whom the villein had previously handed the price of manumission, Glanvil v. 5; P. and M. i 410, 411; Select Cases in the Court of Star Chamber (S.S.) cxxix.

[6] Sometimes they seem to have been made only because the villein was old and useless, see a manumission of the Bishop of Exeter, cited E.H.R. xv 25.

[7] See below 504 n. 3 for the curious point as to whether a tenant in tail of a manor can manumit for a longer period than his own life; Select Cases in the Court of Requests (S.S.) lxxii.

from the following words used by Herle in argument in 1310:[1] "In the beginning," he says, "every man in the world was free, and the law is so favourable to liberty that he who is once found free in a court that bears record shall be holden free for ever, unless it be that some later act of his own makes him villein." But general statements about the rights of man are not of much avail unless they are translated into practical rules. It was because the leaning of the lawyers in favour of liberty was translated into many different practical rules that their views had a large effect all through this period in reducing the number of those who were of villein status;[2] and we shall see that in the following period these rules were the main cause for the final disappearance of those last remnants of a status which still survived to remind men of an order of society which had passed away.[3] I have already touched upon the rules, procedural and otherwise, by virtue of which the lawyers were swift to imply a manumission from any transaction or litigation between lord and villein.[4] The same bias is seen in the rules laid down by them upon the procedure to be followed in trials of disputed questions of status, and upon certain of the modes in which the status might arise.

The lord who wished to recover his fugitive villein could seize him if he returned to his manor,[5] or he could bring the writ *de nativo habendo*.[6] If the lord seized the villein, the villein might bring the writ *de homine replegiando*, and the sheriff would replevy the villein on his giving security to answer the charge of villeinage. If the lord brought his action he might seize pending the trial of the writ, unless the villein sued out the writ *de libertate probanda*.[7] This privilege was, as we have seen, taken away from the villein by a statute of Edward III.'s reign,[8] and the writ fell into disuse.

[1] Y.B. 3 Ed. II. (S.S.) 94; cp. Bracton f. 191b; and Y.B. 30, 31 Ed. I. (R.S.) 166, where *Hervy*, J., says of the doctrine that a nief, married to a freeman, after the death of her husband returns to her former condition, that it is "worse than false, it is heresy."

[2] A good illustration is contained in Y.B. 20 Ed. III. (R.S.) ii 468—"the Prior of St. Dionysius near Southamptone brought his writ of Naifty against John, and, after appearance, he was non suited. Therefore, because this was a writ of right, judgment was given, *in favorem libertatis*, that the defendant was a free man with regard to the Prior and his successors for ever. And this is a case in which, by reason of the non suit of the demandant before the mise has been joined, final judgment will be rendered against him. And the reason is the favour shown to freedom, etc."

[3] Below 508.

[4] Above 492-493.

[5] Y.B. 21, 22 Ed. I. (R.S.) 448, *Metingham*, J., "If my villein beget a child on my land which is villeinage and the child so begotten go out of the limits of my land, and six or seven or more years afterwards return to the same land, and I find him in his own nest, at his own hearth, I can take him and tax him as my villein; for the reason that his return brings him to the same condition as he was in when he went."

[6] Above 20; App. Ia (16).

[7] App. Ia (17); cp. Maitland, Forms of Action 331.

[8] Above 20; below 500.

But the writ *de homine replegiando* was still open to the person so seized.[1] At the trial the lord was under many very serious disadvantages. "The kind of evidence which the lord required to prove villeinage, and allowed in disproof of it, is only applicable to a slavery in blood and family, one uninterruptedly transmitted through a long line of ancestors to the person against whom it was alleged. On the lord's part it was necessary that he should prove the slavery against his villein by other villeins of the same blood, such as were descended from the same common male stock, and would acknowledge themselves villeins to the lord, or those from whom he derived his title; and at least two witnesses of this description, and of the male sex, were requisite for the purpose. Nay, so strict was the law in this respect, that in the Nativo Habendo the defendant was not obliged to plead to the claim of villeinage, unless the lord at the time of declaring on his title brought his witnesses with him into court, and they acknowledged themselves villeins, and swore to their consanguinity with the defendant; and if the plaintiff failed in adducing such previous evidence, the judgment of the court was that the defendant should be free for ever, and the plaintiff was amerced for his false claim. In other actions the production of suit or witnesses by the plaintiff previously to the defendant's pleading fell into disuse.[2] . . . But in the Nativo Habendo the actual production of suit and also the examination of them, unless the defendant released it in court, continued to be indispensable, even down to the time when villeinage expired." Similarly, if the person whose status was at stake "could prove that slavery was not in his blood and family, he entitled himself to liberty."[3] He was allowed to use two or more pleas, for the rules against duplicity in pleading were in this case relaxed. A plea that he or any of his male ancestors was a bastard was a peremptory answer to the lord, because a bastard is a filius nullius, and it cannot be presumed that this unknown person was a villein.[4] "In case of a stranger settling on land, his liberty was always assumed, and the court declined to construe any uncertainty of condition against him. When villeinage was pleaded in bar against a person out of the power of the lord, the special question was very often examined by a jury from the place where the person excepted to had been lately resident, and not by a jury from the country where he had been born. This told against the lord, because the jurors might often have very vague notions as

[1] Hargrave's argument in Sommersett's Case (1771) 20 S.T. 38, 39 n.

[2] Vol. i 301.

[3] Sommersett's Case 43-46 and authorities there cited; "Note that if a man can prove that his great-great-grandfather was a free man, then he himself is no villein because his grandfather and his father and himself may have fallen into and continued in a state of villeinage," Y.B. 5 Ed. II. (S.S.) 113.

[4] Ibid; the rule as to the bastard appears as early as Y.B. 19 Ed. II. ff. 651, 652.

to the previous condition of their new fellow countryman."[1] This leaning in favour of liberty settled some difficult questions as to circumstances under which a child might be born a villein. If both parents were villeins the child was of course a villein; but if one was free difficulties began. The canon law laid down the simple rule that whenever one of the parents was servile the child was servile. According to Bracton, a bastard followed the mother; but if the parents were married much depended on the question whether the child was born in a free or a servile tenement. Later lawyers distinguished more clearly between status and tenure. They made the status of the father the test[2]—a test which was perhaps partly the cause, partly the effect of the rules laid down as to the evidence required to prove servile blood.[3]

In the thirteenth century we can see this same leaning in the doubt as to how far prescription could make free blood servile.[4] Ultimately it was admitted that a title could be made by prescription; but of course a claim of this kind might be met by such defences as bastardy or "adventif."[5] As a matter of fact, if a family holding land by villein services had long been settled in a manor, the presumption of unfree status would be easy to make and difficult to disprove. Though it might be laid down in theory that no title could be made by prescription, the fact that a lord could prove that a family had held by villein tenure, and that it had performed villein services for some generations, would give him the means of satisfying even the strict proof required to maintain the writ *de nativo habendo*. Thus it may easily come to be said that villein status can arise by prescription.[6] We may perhaps find some parallel in the manner in which in later law prescription by way of lost grant sprang up by the side of prescription at common law. In both cases rules of law were adapted to fit the common facts of life and practice.

[1] Vinogradoff, Villeinage 84, 85; such a plea was known as the plea of "*adventif*."

[2] Ibid 59-63; P. and M. i 405, 406.

[3] It is laid down by Britton i 207, and Fitzherbert, Ab. *Villein* pl. 37, that villein descent could not be traced through women; cp. Sommersett's Case, loc. cit. 44 n.

[4] That prescription could not make free blood servile was asserted in a case of 20 Ed. I., reported in Hale, P.C. ii 298, by two judges of assize; but this was reversed by the auditors of complaints; it was also asserted by Britton i 196, 206, and in Y.B. 33-35 Ed. I. (R.S.) 12, 14; see also Y.B. 5 Ed. II. (S.S.) 113 cited above 498 n. 3; the annotator of Britton, however, seems to assert that performance of servile services for five generations will make a free man servile, Vinogradoff 63; but cp. 30, 31 Ed. I. (R.S.) 138; Fitz., Ab. *Villeinage* pl. 24 says that occupation of villein land from time immemorial makes a man a villein: and that a title can be made by prescription seems to follow from what Littleton says §§ 182, 183.

[5] Fitz., Ab. *Villeinage* pl. 24.

[6] See Fitzherbert, Surveying chap. 13 cited below 503; and cp. Litt. § 174—villein service, he says, does not make a free man villein, yet it is "folly of such free man to take in such form lands or tenements to hold of the lord by such bondage."

In the result, villein status as moulded by these influences became a very relative kind of prædial serfdom tempered by custom of the manor and by that communal life which it had inherited from a time before there was common law or legal memory. For many purposes the common law must, in the interests of the state and in obedience to its own principles, hold the villein to be a free and lawful man; and it will throw obstacles in the way of those who wish to reduce their fellows even to this relative servitude. If a man is a villein, the Romanizing tenets of the lawyers of the twelfth and thirteenth centuries have had just sufficient result to give the lord (subject always to the claims of the state) large powers over both his person and his property; and seeing that these powers were for the most part exercised over those who held by an unfree tenure, they formed a useful help in maintaining an agricultural system run upon the labour-service method. So long as that system maintained itself, there was nothing in this relative prædial servitude hopelessly out of harmony with the existing economic and social order. But we have seen that that system really rested upon an unstable basis.[1] The same causes which, by substituting a system of money rents for a system of labour services, destroyed villein tenure, went a long way to render villein status a mischievous survival.

We have seen that the Black Death, by raising the value of labour, increased, and in many cases created, the temptation to desert the land and take service as a hired labourer.[2] We have seen, too, that the Statutes of Labourers endeavoured to fix the price of labour at the older rates.[3] The lords naturally had recourse to the powers which the law gave them over their villeins; and the legislature strengthened their powers. We have seen that in 1350[4] it was enacted that the purchase of the writ *de libertate probanda* should not prevent the lord from seizing his fugitive villein. A statute of 1377,[5] directed against confederacies of the villeins who went about to prove their freedom, enacted that special commissions should be issued to try such cases, and that those arrested should not be admitted to bail or mainprize. A statute of 1384[6] enacted that a plea put in by a lord to an action by a villein should not be construed as a manumission of the villein. But just as legislation was powerless to stop the economic and social change, so it was powerless to preserve a status which had been moulded to fit the older agricultural order. We have seen that the tide was setting strong in favour of the

[1] Above 202-203. [2] Above 203-204. [3] Vol. ii 459-464.
[4] 25 Edward III. st. 5 c. 18. [5] 1 Richard II. c. 6.
[6] 9 Richard II. c. 2; for petitions recounting the grievances of the lords and asking for further legislation see R.P. iii 294, 296 (15 Rich. II. nos. 39 and 5), 448 (1 Hy. IV. no. 6).

system of money rents. It was setting equally strongly in favour of the free labourer. The Statutes of Labourers introduced the claims of a third party between the relation of lord and villein;[1] and though eventually the courts decided that the claims of the lord must prevail[2] if the lord needed his villein, the lords in most cases found that it paid better to lease their land than to fight doubtful actions to get unwilling labour.[3] The court was of opinion in Henry VII.'s reign that a lease for years to a villein operated, like a feoffment of a freehold interest, as an enfranchisement; and this opinion must have freed very many.[4] Moreover, the greater fluidity of labour, which the rise of manufacturing industries and the growth of other pursuits ensured, must have encouraged withdrawal from the manor and thus made it difficult in many cases to prove villein status.[5] For all these reasons villeinage tended in the majority of cases to pass away almost silently; and many lords, when the position of their tenants as copyholders, lessees for years, or tenants at will had become fixed, accepted the situation, and rightly thought it unprofitable to imperil the peace of their "little commonwealth" by insisting upon doubtful claims which would be certain to provoke ill-feeling.[6]

But though these social and economic changes must have operated to reduce the importance of the status, they could not abolish it. It still survived in a decadent condition all through the Tudor period; and the very fact that it thus survived in a decadent condition probably made the lot of the surviving villeins the harder. They could be taunted with their servile condition by more fortunate neighbours whose origin was similar to

[1] As to this see Royal Hist. Soc. Tr. xvii 254, 255. Mr. Savine says, "Professor Petrushevsky shows very well that the Edwardian statutes struck a very heavy blow at the whole fabric of the manorial system. . . . The agents of the king and of the common law, the justices of assize and the justices of peace, entered into the sacred precinct of the manor in order to control the relations between the lord and his villeins. Though perfectly hostile to liberal tendencies, the labour legislation in the long run certainly assisted to loosen the dependence of the bondman on his lord. The man of manorial custom to a certain extent changes into a man of common law;" for early cases upon the conflicting interests of lords and hirer see Y.BB. 40 Ed. III. Mich. pl. 16; 50 Ed. III. Mich. pl. 2.

[2] Y.BB. 22 Hy. VI. Mich. pl. 49 (p. 32); 27 Hy. VI. Mich. pl. 15.

[3] Above 205.

[4] Y.B. 11 Hy. VII. Hil. pl. 6, *Hussey* said, "Si la seignior a luy fait lease pur terme d'ans cest enfranchisement, pour ce que il prend interest in la terre vers le seignior."

[5] Economic Development of a Norfolk Manor 96, "Neither the Forncett nor the Moulton rolls show continuity in the servile population after 1350. The change comes slowly, but gradually the old names disappear. In Forncett by 1556 only three bond families were left.

[6] See the letter of Sir Thomas Denys to the court of Requests in favour of the tenants in the case of Foreacre and Person, Customary tenants of Bradford (Somerset) v. Frauncys, Select Cases in the Court of Requests (S.S.) at p. 122; and cp. D'Ewes' address to the tenants of his manor of Laverham in 1631 on his accession to the property, D'Ewes, Autobiography ii 32 seqq.

their own.[1] A Star Chamber case of the year 1500,[2] which tells us of the manumission of the plaintiff's grandfather by the abbot of Malmesbury, lets us see that the villein of the fifteenth century was beginning to feel his position. John Newman, husbandman, of the age of seventy-five years, deposed that Thomas Carter, his master, "was very desirous to be free and to be manumised, howbeit that he was very aged and had not many yeres to lyve, yet natheleas he had greate mynd that his heires and blode aftre him might be free, and that he might be free or he died, and if he might bring that aboute it wold be more joiful to him than any worlelie goode." He tells us how he went to the abbey with his neighbours, and how the money to be paid for manumission (£10) "was paid and told opinlie upo the boorde in the hall of thabbay," and how he heard the deed of manumission "red opinlie in the hall," and saw it sealed with the abbey seal, and delivered to the said Thomas; he then tells us how, when the ceremony was over, "They that were the said Thomas Carters frindes went forth of thabbay into the town of Malmesberie and there thay yete a cople of Capons . . . and that doone the said Thomas Carter and all his Neighburs rode home to thair houses and on the sonday folowyng, at the parsons hous of Newnton, whos name was Sir Hugh, a northern man, in presence of the substaunce of the parissh, there then for this cause assembled at the desire of the said Thomas Carter, the said dede was opinlie red and declared to the understanding of all thaim that were there bi, the same Sir Hugh and the people there enjoyed and were glad that the said Thomas was manumysed he and his heires."[3]

The reasons why the life of this status was prolonged were chiefly two: (1) It could be made use of for purposes of oppression and chicane; (2) It might in isolated cases be pecuniarily very valuable to the lord.

(1) The existence of the status of villeinage was a valuable weapon in the hands of the overmighty subject. Under cover of a plea of villeinage an easy means was provided for the defeat or delay of creditors. We have seen that up till the year 1363 a plea that the defendant was a villein in some cases stopped the action

[1] Savine, Royal Hist. Soc. Tr. xvii 267, 268, cites a petition from one Shapwke, tenant of the duchy of Lancaster, asking the queen to manumit him because froward people object to the name of bondman, and nobody desires to marry his children; as Mr. Savine says, "It was natural that Norfolk bondmen persuaded Ket to insert the demand of their emancipation in the articles of 1549; that so many bondmen applied to Queen Elizabeth for manumission; that even more bondmen tried to conceal their servile origin and evaded the processes of the inquisitive surveyors."

[2] Select Cases in the Court of Star Chamber (S.S.) 118.

[3] As Leadam remarks, Select Cases in the Court of Star Chamber (S.S.) cxxiv n. 9, provision for the publication of enfranchisement was made as early as the Laws of Henry I. 78. 1.

altogether.[1] The statutes of Richard II's reign, which strengthened the hands of the lords, opened the door to further abuses of a similar character. A petition of 1402 tells us that under cover of the statute of 1384 debtors when sued plead that the plaintiff is their villein; that this plea is enrolled, and sometimes leads to loss of liberty.[2] Still more could be done under cover of a claim of villeinage. Under cover of such a claim a powerful lord could be guilty of false imprisonment and of all kinds of extortion. A petition of 1404 tells us that the statute of 1377 is being abused. Good and honest burgesses and free tenants are imprisoned till they make fine and ransom or consent to hold their lands in villeinage.[3] In a petition from the second decade of the fifteenth century it is alleged that Thomas Saintquyntyn, esquire of the county of York, falsely claimed that John Bigge, a man of some property, was his villein; "and he died because of that slander as the common parlance was," whereupon the said Thomas seized his property wrongfully and with force and arms.[4] From the year 1447 we have the tragic history of John Whitehorne,[5] a gentleman of property in the county of Wiltshire. Humphrey, Duke of Gloucester, captured him under the pretence that he was his villein, and imprisoned him in a castle in Wales belonging to the Earl of Pembroke. There he was detained upwards of seven years in a dark dungeon, and so rigorous was his imprisonment that when he regained his liberty and his property his health was broken and he was totally blind. Against lawlessness of this character the Tudor sovereigns struggled hard; and it is quite clear that the struggle taxed even their strength. Fitzherbert tells us, in his book on surveying,[6] that "there be many freemen taken as bondemen, and their landes and goodes taken fro them, so that they shall nat be able to sue for remedy, to prove themselfe fre of blode. And that is moste commonly where the freemen haue the same name as the bondmen haue, or that his auncesters, of whome he is comen, was manumysed before his byrthe." That Fitzherbert was not drawing upon his imagination is made quite clear from cases which came

[1] Above 495 n. 5.

[2] R.P. iii 499 (4 Hy. IV. no. 50), "Queux defendantz en Court respoignent en chief a l'action de ditz pleintifs; en primies de lour malice fesant protestation que les pleintifs soient lour Villeins, quelle protestation ensi demurant de record serroit mauveys ensample et leger en temps a venir turneroit en perpetuell disheritance de tiels gentz de frank condicion."

[3] R.P. iii 556 (6 Hy. IV. no. 55); we may note that an enemy of the Paston family circulated a report that they were of villein blood, Paston Letters (ed. 1904) Introd. i 26-30.

[4] Select Cases in Chancery (S.S.) 110-111.

[5] R.P. v 448, 449—Whitehorne was a gentleman of property; there were taken from him 60 messuages, 6 tofts, 1 dovecot, 600 acres of land, 30 acres of meadow, 6 acres of pasture, 6s. 8d. worth of rent, besides goods and chattels; for other cases see Select Cases in Chancery (S.S.) 80-81, 151-153, 154-155.

[6] Chap. 13.

before the council, the Star Chamber, and the court of Requests. *Carter v. the Abbot of Malmesbury* of the year 1500 is a case of this character.[1] In the case of *Netheway v. George*,[2] which came before the court of Requests in 1534, the plaintiff sold the defendant an ox. When he asked for the price the defendant, "in moost ragyouse maner," answered, "Thou schalt have noo money of me ffor that oxe, butt swerynge grete and detestable othis that he wolde have your sayd humble subjett his goodes ffor that he toke hym as his bondman, and that he would sease his londes that he hyld of other men and kepe them dewerynge his lyfe and that he would ffeche him att an horse tayle and make hym to turn a broche in his kechyn." We find similar complaints against the Earl of Bath in two cases which came before the court of Requests in 1540 and 1551.[3] In the first case the earl had seized goods of the plaintiff to the value of £400 upon the pretext that he was his bondman, and it was only after three writs of privy seal that the earl made restoration. In the second case he seized his horses and cattle upon the same pretext. But perhaps the most striking of all these cases is one which came before the council in 1586.[4] In that year the council had before them a complaint by the inhabitants of the manor of Thornbury in Gloucestershire of the conduct of Lord Stafford, who claimed them as his villeins regardant to that manor. On June the 19th the council addressed a letter to Lord Stafford, from which it appears that he had attempted to seize no less persons than R. Cole, the Mayor of Bristol, and Thomas, his brother.[5]

Such cases as these go far to explain why the courts had at all periods favoured liberty. The parliamentary petitions, and cases like those of Whitehorne, show us that, as soon as Parliament made it easier to prove villein status, the power to do so was used to cover all manner of fraud and oppression. We may be sure that

[1] Select Cases in the Court of Star Chamber (S.S.) 118.

[2] Select Cases in the Court of Requests (S.S.) 43.

[3] Ibid 48, 54. The earl's defence seems to be based on the view that the ancestor who had enfranchised was only tenant in tail and could not enfranchise for a longer period than his life, ibid lxxii; the law is thus stated in Y.B. 13 Ed. IV. Mich. pl. 4; and this is consistent with the reasons given by the court in Y.B. 2 Hy. VI. Trin. pl. 1, for its decision, that manumission of villeins by tenant in dower was not waste; but it appears from Y.B. 33 Hy. VI. Pasch. pl. 3, cited by Leadam, that one judge at least thought that the rule was once manumitted always free. For what may be a similar case see Plumpton Correspondence (C.S.) 55.

[4] Savine, Royal Hist. Soc. Tr. xvii 261-263, citing Dasent xiv 48, 100, 153; xv 69, 303, 304.

[5] The council ordered Lord Stafford to forbear to molest R. and Th. Cole under pretext that they are his bondmen, "seinge they offer to aunswer his Lordship in lawe, and that their Lordships thincke it requisite that a principall officer of such a place and his brother, having ben both themselves and their auncestors heretofore reputed freemen, should not be so hardlie dealt upon anie suposicion;" for similar acts of the Duke of Buckingham in Henry VIII.'s reign see L.Q.R. ix 364 n. 1, and Royal Hist. Soc. Tr. vi 187-191.

the abuses which cropped up under the new feudalism of the fifteenth century would have been known in the thirteenth century if the vigilance of the courts had been relaxed. When the weakness of the crown gave to a turbulent nobility the powers of turning to feudal uses all the powers of the state and all the technicalities of the law, the law relating to villein status offered many opportunities; and it was only by unremitting diligence that even the powerful jurisdictions of the council, the Chancery, and the court of Requests succeeded in checking these abuses. If in the Tudor period these courts strained the law in the interests of the humbler classes,[1] we must admit that they strained it in the interests of honesty, of liberty, and of orderly government.

(2) The continuance of villein status might in isolated cases be very valuable to the lord. The children of two villeins were also villeins. In the old days such persons would either have occupied their father's place in the manor, or they would have left the manor to follow similar pursuits, paying a small sum as *chevagium* for permission to reside elsewhere. Occasionally we hear of villeins by birth rising to high place.[2] Probably such cases were rare; but it is clear that if some record of them were preserved the lord would have a profitable source of income. The case of Simon of Paris,[3] alderman and former sheriff of the city of London, may show us that as early as 1308 the lords were ready to make their profit out of such accidents of fortune. Simon was seized and imprisoned because he refused the office of reeve, and when he sued for damages he was met by the plea of villeinage. He proved that he was free, and eventually recovered heavy damages. Such a case was rare in the fourteenth century. It was by no means rare in the fifteenth and sixteenth centuries. The villein might either leave the land and pursue some other career, or he might stay on the land. In either case there was a chance for a lord who kept a careful record of the pedigrees of his villeins.

If the villein left the land there were many careers open to him; and, therefore, just because the state of society to which villeinage was more or less natural was decaying, just because a villein by blood might rise, the lord's interest might become very valuable. Speaking of a survey of villeins regardant to the manor of Long Bennington, Lincolnshire, made in 1570, Mr. Savine says,[4] "Many of these villeins had lost almost all vital connection with the manor

[1] Leadam considers, Select Cases in the Court of Requests (S.S.) lv, that this opinion expressed by Froude, History of England ii 449, is perfectly correct.

[2] P. and M. i 415, "It was said that John's famous captain, Gerard de Athie, whose name is handed down to infamy by Magna Carta, was of servile birth; in 1313 the Bishop of Durham manumitted a scholar of Merton who was already a Master."

[3] Y.B. 1, 2 Ed. II. (S.S.) 11-13.

[4] Royal Hist. Soc. Tr. xvii 275.

and the village community. It is strange that three of them were curates in neighbouring counties, and the survey, in full agreement with legal theory, makes no difference between these parsons and the other bondmen. The jurors had lost all trace of one bondman. They heard that he was villein regardant to the manor and that he had died of late, but what goods he left they did not know. The jurors could also say nothing about another deceased bondman, but a speculative search was rewarded by finding that he 'dyed rich by marying of a wydoo sister of Isacke of London.'"[1]

If the villein remained on the land he might acquire other estates and die rich.[2] We have seen that the rise of prices in the sixteenth century caused the rents for which copyholders had commuted their labour services to be much under the value of the land.[3] The same causes which gave the villein a valuable tenant right gave the lord an additional inducement to insist where possible upon the incidents of villein status. If the tenant was rich he would generally be willing to pay a large sum to enfranchise himself; and if he was not willing the lord might use his powers to compel him to do so. There is a case of this kind as early as Henry V.'s reign;[4] and, as the wealth of this class increased, these cases were multiplied. In 1556 a tenant of the manor of Forncett probably paid £120 for his manumission.[5] Mr. Savine says that "the amount of these exactions for enfranchisement was settled in the middle of the sixteenth century . . . in the practice of the Augmentation Office. . . . The bondmen manumitted must pay . . . a third part of their lands and goods."[6] It is for this reason that we have in the books of the Elizabethan surveyors some mention of the value of the villeins as if they were an asset of the manor;[7] and it is for the same reason that in the sixteenth century the crown so frequently manumitted the villeins on its lands.[8] "The thing was done so openly," says Mr. Savine,[9] "that Elizabethan courtiers could receive as a special sign of favour from the sovereign a commission to enfranchise a definite number of villein

[1] The facts in Butler v. Crouch (1568) Dyer 266b illustrate the same point; see also the case of the brothers Cole, above 504; and the case of the Heynes in 1435 in the History of Castle Combe 223, 225; cp. Tawney, Agrarian Problem in the Sixteenth Century, 83-84.

[2] See Economic Development of a Norfolk Manor 88-95 for accounts of the families of Bolitont, Dosy, and Houlot, cp. Tawney, op. cit. 72-73.

[3] Above 212.

[4] Y.B. 2 Hy. V. Trin. pl. 11.

[5] Economic Development of a Norfolk Manor 89, 90; App. XIII. xci.

[6] Royal Hist. Soc. Tr. xvii 270.

[7] See ibid 241, 242 for the Surveyor's Dialogue by Norden, the first edition of which was published in 1607, and for Norden's survey of the Forest of Pickering (1619-1621), in which he enquired into bondmen; we may note that in the tract on Surveying by Clay, published 1624, there is no such mention of bondmen.

[8] For an illustration see the commissions issued by Henry VIII. in 1544, Letters and Papers xix i no. 278 (5) (67).

[9] Royal Hist. Soc. Tr. xvii 270, 271.

families on the crown manors; that is to say, they were enabled to repair their fortunes with the payments for enfranchisement." Thus in 1575 Elizabeth commissioned Sir Henry Lee to manumit two hundred bondmen on the estates of the duchy of Lancaster. These two hundred must pay the price fixed by Lee; and, in default, Lee could seize their lands, together with all lands alienated by them since 1568.[1] These powers were acted on; and careful inventories and valuations were made of the property of the villeins in order that the proper amount for manumission might be levied. Sometimes the villeins were poor and nothing could be got from them. They were not manumitted. Often, as we have seen, they were fairly well off, and then manumission was forced upon them. Elizabeth's action reminds us on a small scale of the manner in which Caracalla extended from fiscal motives the right of Roman citizenship to all the inhabitants of the Empire.[2]

This is clearly the last phase. The chief profit to be made from villeins is a profit to be made from manumissions. The country was settling down at the end of the sixteenth century. Both villein tenure and villein status were obsolete. Public opinion was shocked at the continuance of such an institution as villein status. The doctor in *The Doctor and Student* had grave doubts as to its righteousness.[3] Fitzherbert laments its continuance.[4] Sir Thomas Smith allows that some few exist, but considers that they are almost all extinct.[5] Harrison boldly states that there are none in England, and that such is the privilege of our country "by the especial grace of God and the bounty of our princes, that if any come hither from other realms, so soon as they set foot on land they become as free in condition as their masters."[6] Harrison's words were rather prophetic than true. There was, in fact, some danger in the seventeenth century that, under cover of phrases about the custom of the merchants, the law would recognize a right of property in negro slaves;[7] and in spite of a decision of Holt, C.J., which in effect bore out Harrison's statement,[8] the law

[1] Royal Hist. Soc. Tr. xvii 270, 271.

[2] Girard, Droit Romain 111, "Antonin Caracalla donne en 212 la qualite de citoyens a tous les habitants de l'empire afin de leur étendre à tous l'impôt de cinq pour cent existant sur la succession des citoyens."

[3] II. chap. 18, "Methinketh it first good to see whether it may stand with conscience that one man may claime another to be his villein, and that he may take from him his lands and goods, and put his body in prison if he will, it seemeth hee loveth not his neighbour as himselfe that doth so to him."

[4] Surveyinge, chap. 13 (the first edition of the book was published in 1523); he says, "Howe be it in some places the bondemen contynue as yet, the whiche me semeth is the greatest inconvenience that now is suffred by the lawe."

[5] De Republica Bk. iii chap. viii.

[6] Description of England, cited Savine, Royal Hist. Soc. Tr. xvii 239.

[7] Butts v. Penny (1677) 2 Lev. 201.

[8] Smith v. Brown (1707) 2 Salk. 666.

was not finally so laid down till Lord Mansfield's decision in *Sommersett's Case* in 1771.[1] The decision was then no foregone conclusion. The slave trade was a well established and a lucrative business in which many had an interest; Yorke and Talbot, when attorney and solicitor-general had given an opinion against this view of the law;[2] and Yorke had adhered to this opinion when he became Lord Chancellor.[3] That Lord Mansfield should refuse to follow the custom of the merchants, and should give a decision based mainly on the rules of the mediæval common law, no doubt surprised many of his contemporaries as much as an opposite decision would have surprised us.

It has been suggested that Sir Thomas Smith's book was written in France with the patriotic desire of proclaiming the merits of English institutions.[4] But probably Smith's book told the substantial truth. The courts were putting down the abuses rendered possible by the survivals of villein status. They leaned more strongly than ever in favour of liberty; and they were assisted by Henry VIII.'s statute of limitations, which restricted proceedings upon the writ *de nativo habendo* to a period of sixty years.[5] Landowners valued the status chiefly for what they could get out of the villeins as the price of manumission; and this, as I have said, accounts for the references to it in treatises on the law of manorial courts of the sixteenth century, and in bailiffs' surveys of the sixteenth and even the early years of the seventeenth centuries. Those worth manumitting were manumitted—the rest were not worth considering.

Villein status, then, had become merely a survival of an older social and economic order by the middle of the fifteenth century. Its life had been prolonged to the end of the sixteenth century because it served the purposes of the lawless, and because it sometimes gave to lords valuable rights over persons who prospered either on the land or in some of the other pursuits which afforded careers to the ambitious. When the Tudor dynasty had fulfilled its mission by restoring peace and good government to the country, when lords had made what they could out of their prosperous villeins by selling charters of manumission, this status, always frowned upon by the law, after a long and dishonourable old age, at length died a natural death. The law of villein status was never repealed. It simply fell into disuse because the persons to whom it applied had ceased to exist.[6]

[1] 20 S.T. 1. [2] Ibid at pp. 81-82.

[3] Pearne v. Lisle (1749) Ambler at p. 76.

[4] Royal Hist. Soc. Tr. xvii 240. See Maitland's Introd. to Alston's ed. for the best account of this book; it will be described in Bk. iv Pt. I. c. 1.

[5] 32 Henry VIII. c. 2; Butler v. Crouch (1568) Dyer 266b, 283b.

[6] This is clear enough from the case of Pigg v. Caley (1618) Noy 27, the last case of villein status; the jury found a verdict for the villein; and *Hubbard*, J., in

NOTE ON THE TERMS "REGARDANT" AND "IN GROSS" AS APPLIED TO VILLEINS

There can be no doubt that the terms "regardant" and "in gross" as applied to villeins did not, as has been sometimes asserted, indicate any difference of condition between two classes of villeins. The terms are terms of pleading which are not peculiar to the law of villein status. They are used in exactly the same sense in the law relating to such incorporeal rights as commons, advowsons, or services. Thus in 1310 (Y.B. 3, 4 Ed. II. (S.S.) 103-104) it was said that services of homage, fealty, and ten shillings a year regardant to a manor, on being assigned to a woman for her dower, were assigned as a gross, i.e. the right to collect them was attached to the woman, and not to the ownership of the manor. Similarly a man might claim a villein, a right of common, or an advowson as regardant to a manor, i.e. attached to a manor, of which he was the owner; or he might claim them as his own without reference to any other property owned by himself (Hallam, Middle Ages iii 173 and note xiv; Vinogradoff, Villeinage 48-58). "If," said Bromley, C.J., "a man leases his manor for life or years except his villeins, now they are in gross and not regardant" (Plowden 104). As we have seen (above 166) there were two modes of claiming such rights by prescription, according as they were rights in gross or attached to other property. At the same time the erroneous opinion that these pleading terms as applied to villein status indicated a difference of condition is an old opinion. It seems to have been held by Sir Thomas Smith in the sixteenth century (see extract printed by Vinogradoff, op. cit. 49 n. 1) and was not doubted even by a lawyer like Hargrave in Sommersett's case. But at the date of that case (1771) the law as to villein status had long been obsolete; and we do not find that lawyers like Littleton and Coke, who lived nearer the time when this branch of the law was in use, fell into this mistake (Litt. §§ 175, 181, 182, 185; Co. Litt. 123b). It looks therefore as if this erroneous opinion did not originate with the lawyers. The question is, How did it originate? I would suggest tentatively that the following considerations may supply some sort of reason. (1) Differences in the mode in which a man is obliged to plead his title to a thing sometimes give rise to differences in the rules of law relating to that thing. Thus in Y.B. 20 Ed. III. (R.S.) ii 304-306, it was argued that though a monk who was a dead person in law could not claim a villein as his own, i.e. in gross, he could claim him as regardant to the manor of which he was bailiff. In Y.B. 1 Hy. IV. Mich. pl. 11 (cited P. and M. i 397 n. 1) a nief appeals her lord of the death of her husband; on its being argued that conviction of the lord would mean the enfranchisement of the neif, it was replied that it would only have this effect if she were a villein in gross; for, if regardant to a manor, the manor and the things regardant to it would be forfeit to the crown. Again, in Y.B. 13 Ed. IV. Mich. pl. 4 and 11, there is an inconclusive debate as to whether a decision in favour of a villein, who was claimed as regardant to a manor, was an estoppel to an action claiming him as a villein in gross; and in Y.B. 2 Hy. VI. Trin. pl. 1 there was an attempt to say that though a woman could be endowed of villeins regardant she could not be endowed of villeins in gross. In a few small points, therefore, villeins regardant differed, or were thought to differ, from villeins in gross. (2) We have seen that some villeins stayed on the manor and lived lives similar to those of their forefathers, while others left the manor for other pursuits (above 505-506). We have seen, too, that the copyholders who lived on the manor were protected in respect of their copyholds (above 208-209). There is some evidence for Leadam's view (L.Q.R. ix 358-361) that this protection was given to a copyholder who was a bondman; so that if a lord's copyholder were also his bondman, the lord's rights over his property, other than his copyhold, were greater than over his copyhold. But a villein who left the manor would not be a copyholder. All his property was, in legal theory, at the lord's mercy. I would suggest that in the latter part of the Tudor period, when villein status was becoming rare, when the

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giving judgment remarked, "If a man has not seisin of a villein in gross within sixty years he shall be barred by 32 Henry VIII. of limitations in nativo habendo, for liberty is favoured. But yet of a villein regardant the seisin of the manor to whom, etc., is sufficient seisin of the villein"—the law is clearly unchanged. In France it continued to the end; in 1779 Louis XVI. freed the serfs on the crown lands, but serfdom still remained on the lands of the nobility, Esmein, Histoire du droit Français (11th ed.) 758; and the grievances of the serfs had no small share in causing the Revolution, above 211.

law relating to it was fading into oblivion, the terms "regardant to a manor" and "in gross" were by some taken to apply to these two classes of villeins. There were, as we have seen, small legal differences between them, arising out of the method by which they were claimed. It might easily be supposed, therefore, by those whose knowledge of law was slight, that villeins regardant and villeins in gross were really two sorts of villeins; and there was the distinction in the world of fact ready to hand between those who lived on the manor and had some degree of protection, and those who lived away and had no property which was protected. What was easier and more natural than to apply the term "regardant to a manor" to the one class, and the term "in gross" to the other? I may perhaps add that this was just the sort of confusion which was likely to arise upon a legal subject which was ceasing to possess much practical importance, and yet had both a certain amount of antiquarian interest, and a certain amount of attraction for the literary.

§ 4. The Infant

I shall consider the position of the infant in the mediæval common law under the three following heads: (1) The age of majority, (2) guardianship, and (3) the capacity of the infant.

(1) The age of majority.

We have seen that in Anglo-Saxon days the law recognized that there was a definite age of majority both for males and for females, but that there was no fixed rule as to what that age was.[1] In the eleventh and twelfth centuries there was a similar uncertainty. The tendency seems to have been to fix different ages for different classes of society. The knight came of age at twenty-one; the socman's heir when he was fifteen; the burgess's son when he was of age to count pence, measure cloth, and conduct his father's business.[2] But gradually the rule of the knight came to be the general rule for all classes of society. Twenty-one comes to be the age of majority for ordinary purposes.[3] The other rules lingered on as customs only; and they were customs which did not meet with much favour at the hands of the royal justices.[4] The rule that the tenant holding gavelkind land may make a feoffment at fifteen is perhaps the one permanent survival.[5] We have, as Maitland points out, another instance of the process by which the law for the higher classes of society became the law for all.[6] We have, too, another example of the manner in which the rules of the land law affected all other branches of the law. Twenty-one, then, becomes the age of majority for most purposes; but other ages were recognized as forming less important epochs. Coke gives us some account of the seven ages of a woman "for several purposes appointed to her by law."[7] The rules as to age at which a person had capacity to

[1] Vol. ii 98.
[2] Bracton ff. 86, 86b.
[3] P. and M. ii 436, 437.
[4] Y.BB. 12, 13 Ed. III. (R.S.) 236; 18, 19 Ed. III. (R.S.) 328.
[5] Above 261.
[6] P. and M. ii 436.
[7] Co. Litt. 78b, "Seven yeares for the lord to have aid *pur file marier;* nine yeares to deserve dower; twelve yeares to consent to marriage; until fourteen

make a will of chattels, being a matter for the canon law, followed the Roman rule of fourteen for a male and twelve for a female;[1] while the age at which a person could act as executor was fixed by the canon law at seventeen.[2] The only really important modification of the general rule known to the common law is found in the rules as to criminal and delictual liability. To be guilty of felony a child must, as we have seen, be *doli capax;* and this he may be if he is over the age of seven;[3] while it would almost appear that a child of any age might be liable for a trespass which he had voluntarily committed.[4] This is quite in accordance with the theory of delictual liability which was prevalent during this period.[5] It naturally tended to become modified in later law with the growth of the idea that such liability is founded, not on an unlawful act simply, but upon such an act done intentionally or negligently.[6]

(2) Guardianship.

Though the common law had, by the end of this period, succeeded in fixing upon one definite age of majority for most purposes, it had got no general rules as to the persons to be appointed the guardians of an infant, or as to the rights, powers, or responsibilities involved in guardianship. It knew only a variety of different guardians for various different cases. The father is the natural guardian of his child, and had a remedy if any one attempted to abduct him.[7] If the father was dead the question who was the child's guardian depended upon the nature of the property which he inherited. There was the guardian in chivalry

yeares to be in ward; fourteen yeares to be out of ward if she attained thereunto in the life of her ancestor; sixteen yeares for to tender her marriage if she were under the age of fourteen at the death of her ancestor; and one-and-twenty yeares to alienate her lands, goods, and chattels;" and similarly the man "for several purposes has divers ages assigned unto him"—mostly connected with the incidents of tenure.

[1] Below 545.

[2] Piggot's Case (1598) 5 Co. Rep. 29; Prince's Case (1600) ibid 29b.

[3] Above 372; for the old view that the infant was not in the law till twelve, because not compelled till that age to take the oath of allegiance in the leet, see Hale, P.C. i 23, 24; and cp. Y.B. 30, 31 Ed. I. (R.S.) 529, where this view was acted upon.

[4] Y.B. 35 Hy. VI. Mich. pl. 18, above 376 n. 1.

[5] Above 375-377.

[6] We may note that in the Y.B. cited above n. 4 *Moile*, J., said, "Jeo croy que il ne scait ascun malice;" for the later law see Bk. iv Pt. II. c. 5 § 6; and cp. Pollock's Torts (5th ed.) 50, 51.

[7] P. and M. ii 442; "Al comone ley homme avera accion de son enfaunt ou servaunt pris hors de sa garde;" Y.B. 12 Rich. II. 15 *per* Thirning, J.; Ratcliff's Case (1592) 3 Co. Rep. 37, 39b, "The father has the guardianship of his son *jure naturæ*, and this is inseparable and cannot be waived. . . . The father during his life shall have the marriage of his son . . . and not the lord;" he therefore has the writs of trespass and ravishment of ward if his son be abducted (ibid 38b); even in the case of the father's right of wardship there is some connotation of profit and privilege.

and the guardian in socage for the heir who inherited land held by knight service or socage tenure.[1] An infant heir might well have several different guardians in respect of several different properties which he had inherited.

In the boroughs the borough customs often made some provision for the infant who was an orphan—the London Court of Orphans lasted on till late in the seventeenth century as an effective institution;[2] and there seems to have been some similar provision in the province of York.[3] Perhaps, as Maitland says, "the ecclesiastical courts did something to protect the interests of children by obliging executors and administrators to retain for their use any legacies or 'bairns' parts' to which they had become entitled."[4] But for the case of the ordinary orphan, who was not an heir to land, the common law seems to have made no general rules. When legal proceedings were necessary the court would appoint a guardian *ad litem*, who was often one of its own officials.[5] For the most part, however, the law did not interfere unless there was litigation in process for which a guardian was needed. It may be that here as elsewhere the king was considered to be the guardian of the orphan;[6] but in the Middle Ages and long after he took no steps to assume the responsibilities of that position unless the infant had property, or unless he was involved in litigation.

The truth is that in the Middle Ages the law of guardianship was defective and inadequate because it halted between two opinions—the older opinion that guardianship was a valuable right which existed for the benefit of the guardian,[7] and the newer opinion that guardianship involved responsibilities to the infant. The perdurance of the feudal right of wardship gave an unnaturally long life to the older opinion. As we have seen, there is some connotation of profit even in the case of the father's rights.[8] But we can see the influence of the newer opinion in the statutes which compelled the guardian in socage to account.[9] Owing, however, to the deficiencies of the action of account,[10] the common law had no machinery sufficient to give effect to the newer opinion by compelling the guardian to realize his responsibilities; and it

[1] Above 61-66.
[2] Above 273 n. 2.
[3] Swinburn, Testaments 101-109.
[4] P. and M. ii 442; below 556; as Miss Bateson notes, Borough Customs (S.S.) ii cxxxiii, it was in the Boroughs, where ecclesiastical jurisdiction over probate, etc., was excluded, that a law of guardianship developed. But it was apparently known in the province of York also; I should therefore be rather inclined to connect the phenomenon with the maintenance of the old rules of succession, below 550-554.
[5] Y.B. 35 Hy. VI. Mich. pl. 18 Copley, one of the prothonotaries, was appointed guardian; cp. P. and M. ii. 439 and n. 5.
[6] Brissaud ii 1149.
[7] Above 62; and cp. Brissaud ii 1144-1147.
[8] Above 511 and n. 7.
[9] Vol. ii 65-66.
[10] Vol. i 458-459; above 426-427.

was not until the rise of the equitable jurisdiction of the chancellor that English law obtained such machinery, and, with and in consequence of that machinery, a somewhat more adequate conception of the position of guardian. Even then, as we shall see, older ideas still limited the guardian's activities.[1]

(3) The capacity of the infant.

The question of the legal capacity of an infant must always be a difficult one. It is impossible—especially when the age of majority is twenty-one—to deny him all capacity. Equally it would be obviously unfair to the infant to treat him as a full-grown man. Where and how is the line to be drawn? The problem is easier when we have got a developed system of guardianship. The guardian can act for the ward—his consent can be made necessary for most of the infant's acts, and he can represent him in litigation. Helped by the guardian, we can restrict the scope of the infant's own activities within a small compass. But early law has not got this resource. Guardianship is the privilege of the guardian. In the interests of the infant we cannot allow him a free hand to do acts on the infant's behalf. Nor is it possible to allow him to represent the infant in litigation. As we have seen, the idea that one person can completely represent another for the purposes of litigation is not a primitive idea. Such representation is a luxury to be allowed only occasionally to full-grown men, and under the guarantee of solemn forms[2]—to the end an infant could not appoint an attorney. Early law therefore is obliged to have recourse to a ruder expedient. The guardian will manage the infant's property during his minority; but during that minority the *status quo* must as far as possible be maintained. The infant must get his property at his majority as it was left to him. All claims by or against the infant must await the infant's majority for settlement. All actions to assert those claims will therefore be suspended. To use the technical phraseology of the common law, age will be prayed, and the parol will demur (*loquela remanebit*).[3] It was this conception which was the basis of the common law doctrine as to infants; and it was a conception which was in early days well known in other systems besides that of the common law. What is peculiar to the common law is its long life. It became part of the technical machinery of

[1] Below 520. [2] Vol. ii 315-317.

[3] Brissaud ii 1147 states the general principle very clearly: "La capacité du mineur est nulle; il n'a pas le droit d'agir en justice et il ne saurait être actionné. Les droits qu'il peut avoir ne se dégagent qu'à sa majorité et par conséquent tout procès où il est intéressé doit sommeiller jusque là. Son tuteur n'a pas à le représenter; il agit en son nom propre, pour son compte personnel. D'ailleurs, la représentation en justice est interdite en principe; l'admettre par exception dans ce cas eût été risquer de compromettre les intérêts du mineur."

the common law when the land law and the real actions were the most important part of that law; and in this matter equity followed the law, and applied the doctrine in cases in which it was applied at common law.[1] Having thus been stereotyped in the land law, we are not surprised to find that it lasted in a modified form, along with other archaisms, till the year 1830.[2] In France the doctrine had been wholly abolished exactly five hundred years earlier.[3]

It is therefore with the old conceptions involved in the demurrer of the parol that we must start. We shall see that the beginnings of the modern law on this subject are to be found in the modifications of that doctrine. These modifications have not gone very far at the end of this period; but they have gone far enough to enable us to discern in dim outline some of the main features of our present law. They proceeded upon various principles, and they were introduced at different dates. The fact that the later law of infancy and guardianship has been constructed from the piecing together of a mass of exceptions to an archaic principle has, more than any other single cause, rendered it difficult and obscure. We who write history ought not to complain of survivals; but in this instance we must admit the deplorable effect upon the common law of this particular survival.[4]

There may, perhaps, have been a time when all actions by or against the infant were suspended. But from an early period it was found necessary to modify the principle, both in the interest of the persons injured by the acts of the infant, and in the interests of the infant, who sometimes lost his rights in consequence of the suspension of the action, owing to the disappearance of the proofs necessary to substantiate them.[5] The modified form of the principle, as we find it stated in Bracton, seems to be this:[6] if an infant has obtained property of which his ancestor was seised, a person who claims better right to that property cannot bring his action till the infant attains his majority; and conversely, if an infant claims in the right of his ancestor to have a better right to property of which another is seised, he cannot sue till he comes of age. Similarly, if in a chain of warrantors an infant is vouched, the action will be suspended till the infant comes of age. The

[1] Spence, Equitable Jurisdiction i 616; below 515 n. 5; for the cases in which in later law the doctrine was applied see below 515-516.

[2] 11 George IV., 1 William IV. c. 47 § 10.

[3] Brissaud ii 1148, "En 1330 une ordonnance abolit tout à fait le vieux droit."

[4] Swinburn, Testaments, 101, says, "The customes of this Realme are so divers and contrary one to another, which doe concerne this matter [of guardianship] that I might easily fall into divers errors."

[5] Brissaud ii 1147, 1148.

[6] ff. 274-275b; P. and M. ii 440, 441; cp. the Eyre of Kent (S.S.) ii 102, 208; Y.B. 6 Ed. II. (S.S.) i xxxiv-xxxv.

principle seems already to have been for the most part restricted to the case where the infant is claiming an inherited right to possession, or where a right to possession is being claimed against him as representing some ancestor.[1] It does not as a rule apply where the claim by or against the infant arises out of the infant's own acts or transactions.[2] Thus he may bring the novel disseisin if he is disseised; or, conversely, it may be brought against him if he is a disseisor.[3] This principle, in its application to the real actions, came in time to be overlaid with a mass of technical distinctions between the different classes of these actions; and it was complicated by one or two statutory modifications.[4] But subject to these exceptions it seems to have been founded to the end upon this distinction between actions based upon a right descended and actions based upon the infant's own acts; and the same distinction was observed by the court of Chancery.[5] Even in Bracton's day, the ancient generality of this old principle was thus restricted. He deals with it mainly in its application to some classes of the real actions; and, as I have said, it was in relation to these actions that it survived till the nineteenth century. That it had once been wider we can see from the fact that it was applied to the action of debt when the infant was sued by the creditors of his ancestor,[6] to the action of account, probably under the same conditions,[7] and to the appeal of

[1] Bracton ff. 274b, 422b; Markal's Case (1593) 6 Co. Rep. 3b, "Generally in all real actions which the infant brings upon his own seisin, though he had the land by descent . . . the parol will not demur. . . ." Thus, "when his ancestor dies seised, and the land descends to the infant and he enters and takes esplees and profits, in that case it would be prejudice to the infant that he should lose the seisin which he has, and be delayed till his full age. But when only a bare right descends to him there is no such prejudice. . . . In all cases where a bare right in fee simple descends to him from an ancestor, there, in any ancestral action brought by him, the tenant, without any plea pleaded, may pray that the parol demur;" see Y.BB. 5 Ed. II. (1312) (S.S.) 158-159; the Eyre of Kent (S.S.) ii 140-141; 8 Ed. II. (S.S.) 53, 156-158; 12 Ed. IV. Mich. pl. 20; Fitz., Ab. *Age* pl. 39; Basset's Case (1557) Dyer at ff. 137a, 137b.

[2] Bracton f. 422, "Et sciendum quod respondere tenetur, non obstante ætate, majori in omni casu tam super proprietate quam super possessione, et minori in causa possessionis, si fuerit feoffatus in minori ætate;" Basset's Case (1557) Dyer at f. 137b; see for good instances of the application of this principle Y.B. 3, 4 Ed. II. (S.S.) 14, 185.

[3] See Holford v. Platt (1618) Cro. Jac. at p. 467 *per* Croke, J.; similarly it was held in Smith v. Smith (1606) Cro. Jac. 111 that "dower is demandable against an infant, and he shall not have his age; wherefore it is reason his default should prejudice himself, and not the plaintiff; for otherwise the wife should never recover during his minority, for he would always make default, and dower is to be favoured."

[4] Stat. West. I. 3 Edward I. c. 47; Statute of Gloucester, 6 Edward I. c. 2; Stat. West. II. 13 Edward I. st. 1 c. 40.

[5] "A corresponding rule was adopted by the court of Chancery, and the parol was allowed to demur in that court when the suit was by creditors to affect lands which had descended on an infant heir," Spence, Equitable Jurisdiction i 616.

[6] Y.B. 19 Ed. II. p. 623; cp. Bracton's N.B. case 1543; Fitz., Ab. *Age* pl. 51.

[7] Y.B. 18 Ed. II. p. 563—the report, which is very short, does not state that the liability was that of the ancestor.

felony.[1] We must now turn to the modifications of this old principle which form the beginnings of the modern law as to the capacity of the infant.

We have seen that the deficiencies in the mediæval conception of guardianship were largely caused by the survival, in the interests of the feudal lord, of the old idea that guardianship is a privilege. We have seen that the principle of the demurrer of the parol belongs to the same order of ideas—that it comes to us from a time when to permit the guardian, who had the privileges and profit of the office, to act for the infant would hardly be beneficial to the infant; and from a time when the theory that the guardian could represent the infant was a theory as yet unrecognized by the law. Thus it happened that no comprehensive theory of guardianship arose; and when the old principle of the demurrer of the parol was modified, the modification took the form, not of giving extended powers and liabilities to the guardian, but of allowing the infant himself to do certain acts and to effect certain legal results. In France the old principle was swept away and a law of tutor and ward, based on Roman principles, was gradually substituted;[2] and it would seem that, at the end of the sixteenth century, there were some who thought that it would have been better if the Roman institution of Tutela had been introduced into the common law.[3] But it never was introduced. The old principle of the demurrer of the parol remained; but it was modified by the growth of rules which allowed the infant himself to act in certain cases.

The infant can acquire and own property.[4] He is liable also civilly and, if *doli capax*, criminally for his wrongful acts.[5] It follows from this that he can be made liable if he dispossesses another;[6] if he commits waste, or any kind of trespass;[7] if he does

[1] Y.BB. 21 Ed. III. Trin. pl. 16; 45 Ed. III. Trin. pl. 36; 41 Ass. pl. 14. Here it did some damage. If a child of three appealed a man of felony the parol demurred, and no indictment could be brought (Fitz., Ab. *Corone* pl. 114 = Y.B. 21 Ed. III. Trin. pl. 16); this opened the door to collusion and evasion; therefore we find that the rule was abandoned in Henry VI.'s reign (Fitz., Ab. *Corone* pl. 278, 279).

[2] Brissaud ii 1159 n. 5, "On peut dire qu'au quatorzième siècle, l'idée de protection du mineur l'emporte; à partir de ce moment, elle pénètre de plus en plus la législation et la pratique."

[3] Thus in Beverley's Case (1603) 4 Co. Rep. at ff. 125b, 126a, Coke tells us that in the case of lunatics, many preferred the civil law, and that it was commonly said to be "a great defect in law that no tutor is assigned to them by law, who may protect them, and principally their inheritance"—clearly much the same reasoning is applicable to infants.

[4] P. and M. ii 437, 438. [5] Above 372, 376.

[6] Bracton f. 422, "Respondebit etiam in minori ætate de facto suo et injuria sua propria, tam in causa criminali quam civili, dum tamen civiliter agatur: ut si minor disseysinam fecerit, ad assisam novæ disseysinæ respondebit."

[7] Y.B. 3 Hy. VI. Mich. pl. 22.

not pay the rent or perform the services due from his land.[1] Conversely he can sue for money due to himself,[2] or bring the action of account against one who has received money on his behalf.[3]

It is when we come to attempted activities on the part of the infant, such as the alienation or letting of his property, the purchasing of goods, the receipt of money on behalf of another, or the detention of another's property, that doubts begin.[4] After some conflict of opinion[5] it was settled, at the end of this period, that he could lease his property, though he could disaffirm the transaction when he came of age. In other words, such an act was not void, but voidable.[6] It was therefore impossible for an infant to make a disposition of his property which would bind him irrevocably when he came of age. But this disability was in many cases by no means for the advantage of the infant. This fact was beginning to be perceived in the sixteenth and early seventeenth centuries; and the courts tried to get round the rule by a very curious expedient. There was authority in the Year Books for the proposition that, if an infant appeared by a guardian *ad litem*,[7] and the guardian caused him loss by the negligent way in which he conducted the litigation, the infant had a right of action against the guardian.[8] Thus if the guardian had omitted to plead infancy, and judgment had been given against the infant, the judgment stood, and the infant's only remedy was against the guardian.[9] From these premises the conclusion was deduced that if an infant conveyed his property by common recovery in which he appeared by guardian and did not plead infancy, the conveyance stood.[10] The infant, it was said, had a remedy against his guardian which was, or ought to be sufficient,[11] as it was the

[1] Markal's Case (1593) 6 Co. Rep. 3b; cp. Y.B. 18 Ed. IV. Pasch. pl. 7; Fitz., Ab. *Age* pl. 33, 55, 140, but see *contra* pl. 109, 132.

[2] Y.B. 18 Ed. IV. Pasch. pl. 7 *per* Brian and Littleton.

[3] Y.B. 6 Ed. III. Mich. pl. 12.

[4] Fitz., Ab. *Enfant* pl. 11—account does not lie against an infant; Y.B. 41 Ed. III. Mich. pl. 35—detinue does not lie.

[5] Y.B. 3, 4 Ed. II. (S.S.) 142 *Stanton*, J., seems to think that a release by an infant is worth nothing; Eyre of Kent (S.S.) ii 181, 183 an infant's deed is held to be void; Y.B. 9 Hy. VI. Pasch. pl. 13 there is a long discussion as to whether a feoffment by an infant is void or voidable.

[6] Y.B. 7 Ed. IV. Pasch. pl. 16 (p. 6) *per* Brian, a lease by a feme covert is "al commencement merement void et nemy bon. . . . Et il n'est semble l'ou un enfant deins age fait un lease reservant certein rent, car il poit faire cel lease bon per agreement quant il vient a son plein age, pur ceo que cel lease fuit bon al commencement;" cp. Y.B. 9 Hy. VII. Pasch. pl. 7; Ketsey's Case (1614) Cro. Jac. 320.

[7] For this guardian see above 512; below 519.

[8] Y.B. 9 Ed. IV. Mich. pl. 10 (p. 35). [9] Ibid.

[10] See Blount's Case (1618) Hob. at p. 197, where the prothonotaries cited precedents of such recoveries from M. 38 H. 8 onwards.

[11] "An enfant tenant in tail did suffer a recovery by his guardian; it was holden by the Court, that the same should binde him, because he might have remedy over against the guardian by action upon the case," Zouch and Michel's Case (1610) Godbolt. 61.

duty of the court to see that the guardian it appointed was capable of answering in damages to the infant.[1] Clearly this rule, based on this somewhat far-fetched reason, was adopted in order to provide a means by which an infant might make an indefeasible conveyance; and at the end of the sixteenth century it was apparently accepted as good law, and the expedient was extensively employed for this purpose.[2] But its efficacy was seriously shaken by Coke's ruling in 1614 that "a common recovery against an infant, although he appears by guardian, shall not bind the infant."[3] To get over this ruling the expedient was adopted, certainly as early as 1618,[4] of petitioning the king to write to the judges of the Common Pleas a letter under the privy seal requesting them to allow the infant to suffer a recovery. If he did so, and the recovery was suffered, it was the established rule during the seventeenth century that the infant was bound.[5] But the judges had always claimed some discretion in allowing or refusing to allow these recoveries; and after the Revolution they asserted their independence more strongly, and sometimes refused to allow a recovery in obedience to an order of the king.[6] This seems to have been fatal to the efficacy of this expedient, as Cruise tells us that, when he wrote, it had ceased to be the practice to apply to the king, and that recourse was always had to a private Act of Parliament.[7]

As the law of contract during this period was less developed than the law of property, there is less authority as to the contractual capacity of infants. We can see, however, the beginnings of some of the later rules of the common law. As a general rule the law was tending to treat such contracts in the same manner as the other acts of an infant, and to rule that they were not void, but voidable. Even if a contract was clearly for the benefit of the infant,[8] such as a contract of apprenticeship, it was held at

[1] Y.B. 9 Ed. IV. Mich. pl. 10 (p. 34); Newport v. Mildmay (1634) Cro. Car. 307.

[2] Stapleton's Case (1596) Cro. Eliza. 471; Blount's Case (1618) Hob. 196; Newport v. Mildmay (1634) Cro. Car. 307.

[3] Mary Portington's Case 10 Co. Rep. at f. 43a.

[4] Blount's Case Hob. 196.

[5] Heskett v. Lee (1670) 1 Mod. 48; S.C. 2 Wms. Saunders 95-96 and note, cp. Hulbut v. Watts (1697) 1 Ld. Raym. at p. 112 where it was stated in argument that "it is the usual practice" for infants to suffer these recoveries in pursuance of these writs under the privy seal; for instances of their issue see S.P. Dom. 1638-1639, 440, ccccxii 74; 1660-1661, 588, xxxv 59.

[6] Sir John St. Alban's Case (1689) 2 Salk. 567.

[7] Fines and Recoveries (3rd ed.) ii 184.

[8] "*Tilton.*—We have said that the loan was for your profit, and you ought to be answerable for it, just as an infant under age is answerable when he attains his age for what he has received to his profit. *Assheley.*—I do not agree in that . . . for an infant when he attains his age may disclaim all that he did while he was under age," Eyre of Kent (S.S.) ii 46-47; Assheley's view prevailed, see Y.BB. 21 Hy. VI. Hil. pl. 18; 21 Ed. IV. Pasch. pl. 17; Gylbert v. Fletcher (1630) Cro. Car. 179.

the end of this period, in spite of a little earlier authority to the contrary,[1] that it was voidable. But we can see signs of two later modifications of this general rule. In the first place, if an infant had taken a lease of land and occupied the land he must pay the rent[2]—a decision which helped to establish the modern rule[3] that, "When an infant acquires an interest in permanent property to which obligations attach, or enters into a contract which involves rights and duties, benefits and liabilities, and takes some benefit under the contract, he is bound, unless he expressly disclaims the contracts."[4] In the second place the courts were gradually coming to the conclusion that a contract for necessaries will bind the infant to pay the money due in such a case; but what will be deemed to be necessaries, and whether or not the infant must pay the contract price, are questions which will not be settled till a later period in the history of the law.[5]

We must note that in all these cases it is the infant himself who acts. Therefore it became necessary to consider how he should appear before the court if his acts came into question. Old ideas prevented him from appointing an attorney.[6] Gradually the idea sprang up that the court should allow a next friend to sue on behalf of the infant who had some right to assert; while, if he was sued, the court should appoint a guardian *ad litem*, who might, as we have seen, be one of its own officials.[7]

[1] In Y.B. 12 Rich. II. 108-110 it was maintained that a contract of service could be made by a child of twelve; this may be due to ideas derived from the Statutes of Labourers; in Y.B. 21 Hy. VI. Hil. pl. 18 Newton distinguishes an obligation to serve based on those statutes and a contract of apprenticeship; see vol. ii 462.

[2] Y.B. 21 Hy. VI. Hil. pl. 18 (p. 31) *per* Newton; cp. Ketsey's Case (1614) Cro. Jac. 320.

[3] See Birkenhead Rly. Co. v. Pilcher (1857) 5 Ex. at p. 126 *per* Parke, B.

[4] Anson, Contracts (12th ed.) 124-125.

[5] In Y.B. 21 Hy. VI. Hil. pl. 18 the question whether the infant could be bound for necessaries was discussed. Paston seemed to think he could not; the question also appears doubtful in Y.B. 10 Hy. VI. Mich. pl. 46; but in Y.B. 18 Ed. IV. Pasch. pl. 7 we get the modern principle laid down in a dictum of Vavisour's to the following effect: "*Vavisour* dit *in secreto* a *Littleton* a meme le temps, que si un enfant soit al table ove moy pregnant pour son table xx deniers per chescun semaign, ou s'il achate vesture ou draps de moy . . . jeo avera accion de Det vers luy, et ne sera plee a dire que il fuit deins age, pour ce que le ley entend que il ne poit vivre sans manger boier et vesture, et pour ce le ley voit que il rendra l'argent due per luy en cest case;" seeing that the plaintiff in Debt must sue for the agreed price (Y.B. 3 Hy. VI. Mich. pl. 4 (p. 5)), it would seem that if Debt lay, the agreed price, and not simply a reasonable price, could be recovered; we shall see that the modern rule that only a reasonable price is recoverable grew up in connection with the form of the action usually employed in later law—assumpsit on a quantum meruit, Bk. iv Pt. II. c. 3 § 2.

[6] Bracton f. 422; vol. ii 317.

[7] Above 512 n. 5; see the Register f. 93b for the writ; Stat. West. I. c. 48; Stat. West. II. c. 15; as Coke says (Second Instit. 390) the guardian and the next friend are often in the older writers taken as almost synonymous terms; see Y.B. 2 Ed. III. Mich. pl. 13 for a suit by next friend.

And, when an infant is a party, the court will not be extreme to mark small deviations from its procedural rules.[1]

In the absence, then, of a comprehensive law of guardianship the common law attempted to define the capacity of the infant. It made him liable, and it allowed him to act in certain cases; and, at the end of this period, it was arriving at some tentative conclusions as to the legal results of those acts. It was not till feudal wardship was abolished, and the equitable conception of trusteeship was so extended as to embrace the guardian,[2] that the guardian was able in any way to supplement the imperfect capacity of the infant. Even then the powers of the guardian, unless expressly conferred upon him by some one who was settling property on the infant, were very limited. We have seen that to increase these powers, or to enable the infant to bind himself irrevocably, a private Act of Parliament was necessary.[3] It is not till these last days, and by express statutory provision, that the guardian of the infant who owns land has been empowered to act on the infant's behalf.[4] English law has adhered so closely to the old ideas embodied in the demurrer of the parol, that the guardian cannot act generally for the infant; and the infant, therefore, except in so far as later rules have allowed him to modify his own position, must get his property at his majority in the same condition as it was in at the time when he succeeded to it.

§ 5. The Married Woman

The status of the married woman is one of the most difficult of all the problems of private law; and to it legal systems have given, and still give, the most diverse answers.[5] No legal system which deals merely with human rules of conduct desires to pry too closely into the relationship of husband and wife. Dealings between husband and wife are for the most part privileged. But some rules every legal system must have to regulate the proprietary relationships of the parties when they both own property, and to regulate the fate of such property when the marriage terminates. Then, again, both husband and wife have dealings with the outside world. The wife may commit crimes, or torts, or make contracts. What is her position and that of her husband

[1] Above 373 n. 3; Fitz., Ab. *Enfant* pl. 7; 41 Ass. p. 254 pl. 14; Y.B. 20 Ed. III. (R.S.) i 272, 422; Dyer at f. 104b; P. and M. ii 439; for a modern case in which an infant was given a procedural privilege which could not have been given to an adult see Rhodes v. Swithenbank (1889) 22 Q.B.D. 577.

[2] Vol. i 437 n. 1, 466.

[3] Above 518.

[4] Settled Land Act, 1882, 44, 45 Victoria c. 38 §§ 59, 60.

[5] P. and M. ii 397.

with respect to these diverse activities? It is obvious that the answer given will be coloured by the prevailing views as to the constitution of the family. One answer will be given if the family recognized by law is an agnatic family, another if the woman and her children are regarded as related to her old family. In later law the answer given will be coloured by the position in society which the married couple occupy. There will be one law for the noble, another for the free but not noble, another for the burgess.[1] Still later it will be coloured, in the interest of the wife, by ideas drawn from the later Roman law which carefully safeguarded the married woman's *dos*.[2] Up to comparatively recent times, and especially in the Middle Ages, it will be coloured by the canonist's conception of marriage as a sacrament which makes the husband and wife one flesh, and gives the husband dominion over the wife.[3] Thus many varied influences are brought to bear upon a legal problem, the factors of which are, in the normal case very hazy. The woman has property; the man has property; as we have seen, both have powers of dealing with it, and both have certain rights of succession.[4] While things go well the husband will probably have the largest share in managing this common stock; but neither will wish to see this stock permanently dissipated. It is not right that the family property should be squandered: at the same time it is advisable to give the husband a free hand in its management—he is the head of the family. The problem is to draw the line in such a way as to preserve something for the wife and family without unduly fettering the powers of the husband; to protect the wife, and yet not give her and her property so ample a protection that third parties will be prejudiced. It is not surprising that to a problem so delicate, so many-sided, and complicated by so many varying ideas, new and old, as to the nature of the family and the conception of marriage, there should have been many different answers.

Taking a very broad view of the many various answers which have been given to this problem, we can say that the lawyers of Western Europe recognized two main systems. There were the

[1] Below 524-525.

[2] Cp. e.g. Brissaud ii 1726-1727 as to the borrowing of the principle of the separatio bonorum in the sixteenth century; for the "Regime Dotal Romain" as it existed in Italy, Spain and the pays de droit écrit, see ibid 1689-1694.

[3] For a belated instance of the religious influence see Hawkins, P.C. i 93; he is explaining the rule that the wife cannot commit larceny of her husband's goods, and says, "A husband and wife are considered but as one person in law, and the husband, by endowing his wife at marriage with all his worldly goods, gives her a kind of interest in them;" cp. below 530 for Bracton's rule as to the wife aiding the husband who has committed felony.

[4] Above 185-197; below 550, 561.

countries which recognized a system of community of ownership between husband and wife, and countries which did not. Under the first head fall the co-partnership in acquisitions recognized in Spain and south-west France, the co-ownership of movables and acquisitions recognized in France in the *pays du droit coutumièr* and in some parts of Germany, and the co-ownership in all property recognized in other parts of Germany. Under the second head fall England, Normandy, a large part of Germany and Switzerland, the *pays du droit écrit* and some parts of the east of France, Italy, and the parts of Spain which recognized the system of the Roman *dos*.[1]

But in the Middle Ages the fundamental division between these two systems was by no means clear cut. The lawyers had not yet sharpened their distinctions and invented detailed rules to give effect to their principles. The principles themselves were still governed by custom, and were therefore hazy and flexible. As Brissaud says,[2] "Up to the end of the older law it could be said, however paradoxical the expression may seem, that the set of rules which approached most nearly to community was the set of rules which excluded community. . . . Where community is recognized, it is said, the woman is interested in the prosperity of the household; that is true; but it is not more true where it is recognized, and where she only has a right to a third of the common property, than where it is not recognized and she also has a right to a third as survivor. The transmission to her heirs of her rights in the common fund is the only practical difference. At first, then, the system of community does not differ much from the rules which obtained among the barbarians. But an evolution, due entirely to 'jurisprudence' and to practice, modified the primitive traits of the system of community by multiplying in the interest of the wife privileges and safeguards as checks upon the very extensive powers of the husband. . . . It is because originally the system of community was not very different from the older system that there were retained, side by side with it, institutions such as the dower and the mutual gift, which were far more in harmony with the older order." It was possible for a strong "jurisprudence," by insisting on one aspect of the older order and by neglecting another, to construct out of it the most divergent systems of law. We are at the source of the stream, and a very little will determine whether the water flows down one slope or the other.

English law of the twelfth and the beginning of the thirteenth centuries is the law of a period which has not yet made up its mind as to the position of the married woman. Let us take first of all the case of the wife's land. Neither husband nor wife can

[1] Brissaud ii 1655. [2] ii 1699, 1700.

be sued without the other. But, according to some, if this course is pursued the husband may vouch his wife as warrantor, and she will appear and plead; according to others the writ will abate.[1] The husband can alienate the wife's land; but the wife sometimes gives her land with her husband's consent, sometimes she conveys her land together with her husband; and the price is either paid to both, or a separate price is given to each.[2] It was not till Bracton's day, and as the result of judicial decision, that the rule became clear that a fine, and a fine alone, will suffice to convey the wife's land; but in Henry II.'s reign we see the germs of such a rule in the fact that the conveyance before a court is deemed advisable if a married woman is the conveying party.[3] Similarly, as we have seen, it was not till the beginning of the fifteenth century that the wife gained a settled right to dower out of a third of the husband's lands of which he had ever been solely seised for an estate of inheritance during the marriage.[4]

If we look at the wife's chattels we shall see that it is not at all certain that she cannot own chattels. In 1231 a wife living apart from her husband was successfully sued for goods bought and money borrowed.[5] In later law a married woman could, by the custom of certain towns, be sued if she was carrying on a trade apart from her husband.[6] We shall see that there has been considerable doubt as to whether or not a wife could make a will; and that long after the thirteenth century such wills were known.[7] Even in the developed common law a wife's will would hold good if the husband did not dispute it;[8] and the rule that the wife's personal ornaments—her paraphernalia—will survive to her may well take us back to primitive rules which regarded these things as peculiarly her property.[9] Again, we shall see that the wife in early days had a right to a third of the chattels if she survived her husband, of which right probably the husband could not deprive her by his will; and that it is by no means certain that the wife could not dispose of this third by her will.[10]

[1] P. and M. ii 405, 406.

[2] Ibid 407, 408, and references there cited; cp. Eynsham Cart. nos. 163, 164.

[3] P. and M. ii 409, 410, and reference to Winchcombe Landboc i 180 there cited; cp. Y.BB. 30, 31 Ed. I. (R.S.) 364, "*Bereford*, J.—If you have had an attornment in pais why do you wish to have it here in court? *Warr.*—To make sure Adam's estate; because Christiana is a married woman;" 32, 33 Ed. I. (R.S.) 46, a release and quit claim in court affecting a wife, and afterwards sued on; see Y.B. 18 Ed. III. (R.S.) 376 for a survival, "We tell you that by the custom of Winchester, where the tenements are, if a husband and his wife make a feoffment, and the wife comes into their court there and acknowledges that it is her wish, she is barred for ever."

[4] Above 193.

[5] Bracton's Note Book case 568, cited P. and M. ii 432.

[6] Borough Customs (S.S.) ii cxii, cxiii.

[7] Below 543.

[8] Below 544.

[9] Ibid.

[10] Below 550, 555.

The husband is husband, and as such the guardian of his wife's property. He has large powers over that property, whether it be chattels or land. But these large powers do not necessarily mean that the wife has no powers, still less that she has no rights. Many of these rules show us that the law might easily have decided in favour of recognizing a community of ownership between husband and wife.[1]

In the course of the thirteenth century the law took a turn which resulted in the rejection of any theory of community. This was due to two causes. (1) We have seen that the royal courts, and therefore the common law, surrendered to the ecclesiastical courts all jurisdiction over testamentary and intestate succession to chattels.[2] This meant that the common law lost sight of the wife's right to chattels on the death of her husband. It looked only at the state of things which existed while the marriage lasted; and, during this period, both in countries which recognized community and in countries which did not, its chief feature was the absolute control of the husband. Thus the common law naturally tended to magnify the control of the husband to such a degree that it literally gave him the chattels of the wife, and denied the wife any capacity to own them.[3] We may note that, in the case of land, the husband's and wife's rights of succession after death were not left to the ecclesiastical courts. We have seen that the wife got a right to dower out of her husband's lands, of which her husband could not deprive her;[4] and that, though the husband had large powers over the wife's land, that land went eventually to her heirs.[5] If the common law had been obliged to consider the rights of the husband and wife to each other's chattels after death, as they were obliged to consider their rights to each other's land, we may well doubt whether they would have laid it down that marriage gives the wife's chattels absolutely to the husband. We shall see that this view is borne out by the position assigned to the husband by the developed common law in relation to his wife's land as compared with the position assigned to him in relation to her chattels.[6] (2) As we have seen, the common law made the law of the nobles the law for all. Brissaud[7] tells us that "community

[1] Cp. these two passages of Bracton; (1) f. 32a, "Omnia quæ uxoris sunt, sunt ipsius viri, nec habeat uxor potestatem sui, sed vir;" and (2) f. 429a (speaking of land), "Res tamen *propria uxoris et vir ejus custos*, cum sit caput mulieris, et in quo casu non respondebitur viro sine uxore nec e contrario."

[2] Vol. i 625-630.

[3] P. and M. ii 430, if the lay lawyer "had been compelled to meditate upon the fate which would befall this mass of goods, so soon as one of the spouses died, he might have come to a conclusion which his foreign brethren accepted, namely, that the existence of a community is by no means disproved by the absolute power of the husband, who is, so long as the marriage endures, the head of the community;" below 526-527.

[4] Above 193-194.

[5] Above 179.

[6] Below 525-526.

[7] ii 1705, 1706.

is the law of the merchants;" that "in the country the land does not belong to the peasant, but to the lord. These smaller folk have little else than movables, and the wife's cannot easily be distinguished from the husband's; they are therefore held in community. Thus community is the system which prevails among the serfs and the roturiers. This system made its way with far greater difficulty among the class of nobles. The share which belonged to the wife was generally very moderate—unless she was the heiress of a fief. She was obliged to be content with her dower. In time the system of community was extended to the nobles, but the Queen of France never owned her chattels in community with the king—a remarkable survival from the older system." Here in England the situation is reversed. The law of the smaller folk disappears, and lives on only in some of the borough customs, which treated the woman who carried on a trade apart from her husband as, in some respects, independent;[1] while the Queen of England, certainly as early as 1343-1344, was treated by the courts as an unmarried woman in respect of her proprietary capacity.[2]

In this section I shall deal with the status of the married woman while the marriage lasts. The rules as to the succession of husband and wife to each other's realty I have already dealt with:[3] the rules as to succession to personalty I shall deal with in the following chapter.[4] The subject will fall under the following heads: (i) Property, (ii) Contract, (iii) Criminal and civil liability.

(i) *Property.*

Over the wife's freehold interests in land the husband has complete power—but only for so long as the marriage lasts, or, if there has been a child of the marriage capable of inheriting, during his life. When the husband dies the land will go to the wife's heirs, if she has predeceased him; if she has not, she may get back from the alienee any of her land alienated by her husband by the writ of entry known as the *cui in vita.*[5] The

[1] Vol. ii 387; P. and M. ii 400; cp. Hemmeon, Burgage Tenure in Mediæval England 144-146.

[2] Y.B. 17, 18 Ed. III. (R.S.) 430, Queen Philippa was the plaintiff in a *Quare impedit;* "*R. Thorpe* defended . . . and said that he did not understand that he would be put to answer, because this is a suit taken according to the common law, and she who is plaintiff is covert baron, and is not in a condition to be answered without her husband. *Hilary*, J.—Answer. And he said by judgment that this was fitting;" but it should be noted that by the statute of 1 Henry VIII. c. 18, which confirmed the letters patent granting Queen Katharine her dower, she is not only given the privileges of an English subject, but also those of a feme sole—perhaps only ex abundanti cautela. It was clearly a convenient rule, seeing that the king could not be sued at all; and very likely this was the origin of the queen's privilege.

[3] Above 185-197. [4] Below 550, 561.

[5] For the writ see above 22; Y.B. 20, 21 Ed. I. (R.S.) 20, "Note that if a woman make a quit claim while she is coverte, and quit claim her dower for the whole of her life, it is worth nothing."

only mode in which the wife can be debarred from this remedy is by making a conveyance by fine, during the levying of which she has been separately examined.[1] If an estate is conveyed to the husband and the wife they take, as we have seen, as tenants by entireties—both own the whole. Neither during the marriage has anything of which he or she can dispose save by fine.[2] If actions are brought concerning the wife's land they must be brought by or against both—otherwise the writ will abate.[3] The wife was empowered to intervene in collusive legal proceedings taken by the husband in order to deprive her of her land.[4] In these rules we see, not so much an ownership by the husband of the wife's land, as a developed form of the husband's profitable guardianship over the wife's land while the marriage lasts. It is this idea of guardianship, defined and hardened into definite rules, which ultimately gave the husband an estate, but a peculiar limited estate, in the wife's lands. In 1310-1311 two men and their wives brought Entry *ad terminum qui præteriit*, and it was said in the writ that the property ought to revert to the men and their wives. Herle excepted to the writ on the ground that the reversion was said to belong to the husbands as well as to the wives. But Bereford, C.J., said, "How can the reversion be to the wives alone whilst they are covert? The reversion of the demesne can be to the husbands [with their wives], although the reversion of the right belongs to the wives."[5] As Coke puts it, "the estate which the husband gaineth dependeth upon uncertainty and consisteth in privity."[6]

There are no limitations to the husband's rights over his wife's chattels. From the end of the thirteenth century the common law has definitely decided that marriage makes the wife's chattels absolutely the property of her husband.[7] Husband and wife cannot own chattels in common, as the Year Book of 7 Henry

[1] Above 245. [2] Above 126, 128.

[3] It was just about Bracton's time that the point was settled that the husband, if sued without his wife, should plead in abatement of the writ, P. and M. ii 405-406; Eyre of Kent (S.S.) ii 28-29; above 523; for the later law see Comyn, Digest, *Baron et Feme* v.

[4] 13 Edward I. st. 1 c. 3.

[5] Y.B. 4 Ed. II. (S.S.) 41; in this case Stanton, J., differed from Bereford, and the writ abated; but Bereford's view prevailed in another similar case, ibid 44; see a discussion as to the nature of this estate in Y.B. 10 Hy. VI. Mich. pl. 38, *Cottesmore* said that the husband "aura estat en le franktenement a term de vie sa feme;" but *Chant* said, "Le franktenement n'est pas merement en le baron, eins tout en le feme"—pointing out that her estate would be forfeited for her felony; *Newton* adopted the first view, which was that which prevailed; thus it followed that if one feme sole leased to another, and both married, and died, the one husband by virtue of his estate could sue the other for rent in arrear.

[6] Co. Litt. 351a.

[7] Britton i 227; Y.BB. 30, 31 Ed. I. (R.S.) 522, 538; 32, 33 Ed. I. (R.S.) 186; 33-35 Ed. I. (R.S.) 312; 12 Rich. II. 33.

VI. says;[1] and this rule is accepted with all its consequences—the husband, for instance, cannot give his wife anything during the marriage;[2] and if a married woman were convicted of felony no enquiry was made as to her chattels.[3] It is a rule to which there are no real exceptions. We may perhaps see a partial exception in the wife's paraphernalia—the dress and personal ornaments. These, it is true, survive to her, but only if the husband has not alienated them.[4] That the husband does not acquire her choses in action not reduced to possession [5] is no exception at all. As we have seen, a man has not got things which he does not possess.[6] He has a right to reduce them to possession while the marriage lasts; and he can sue for them alone.[7] If he does not exercise that right they are not his.[8]

Chattels real, such as a term of years, a wardship, a statute merchant or staple, seem to be halfway between land and "pure personalty."[9] They are so far chattels that they are the property of the husband which he can alienate, as he can alienate any of his other chattels. They are so far land that, if he does not alienate them in his lifetime, they will survive to the wife free from any charges created by the husband.[10] They will not pass under his will; nor will they go with his other chattels to his next of kin. The law on this point was doubtful in Henry IV.'s reign;[11] but it seems to have been settled in this way at least as early as the beginning of Henry VI.'s reign.[12] This solution was well suited to the double character of this class of property.

[1] Y.B. 7 Hy. VI. Mich. pl. 6, "Le baron et sa feme ne poit aver biens en commun."

[2] The Eyre of Kent (S.S.) ii 29. [3] Ibid i 112.

[4] P. and M. ii 427, 428; for the modern rules see Tasker v. Tasker [1895] P. 1.

[5] Y.B. 10 Hy. VI. Mich. pl. 38 (p. 12).

[6] Above 92 and n. 10.

[7] Y.B. 3, 4 Ed. II. (S.S.) 150.

[8] Y.B. 5 Ed. II. (S.S.) (1312) 248.

[9] "As to this which is said of a lease for a term of years made to the husband and to the wife, and likewise of a writ of wardship, I say that it is not a similar case to this [i.e. a case of pure personalty] because these cases are in the realty, etc.," Y.B. 12 Rich. II. 37 *per* Thirning, J.

[10] The Eyre of Kent (S.S.) ii 29.

[11] Y.B. 2 Hy. IV. Pasch. pl. 14, Debt against husband and wife on a lease for years, "*Thirning.*—Ceo est un chatel real quel vestue auxi bien en le person le feme, come en le person le baron, et tout serra entendue pour le profit del feme, et cel profit nous ne voilloms pas demitter ou devester hors de sa person, tanque elle disagrea quand elle est sole, et le voit faire. Et fuit dit per son agreement, quand elle est sole, elle est charge de tout le ferme incurue en temps son baron. *Hankford.*—Il moy semble que tout sera adjudge en le baron, car il poit doner le terme de la feme, et deviser . . . *cujus contrarium alii;*" cp. Y.BB. 14 Ed. III. (R.S.) 280; 45 Ed. III. Mich. pl. 7.

[12] Y.B. 7 Hy. VI. Mich. pl. 6, "Quand la feme continua son estat en le terme, et or est eins le terme apres la mort le baron, elle serra adjuge eins en son melior droit del term, i.e. par le lessor, et nemy par le baron . . . *et ceo fuit l'opinion de court;*" Co. Litt. 351a and b.

(ii) *Contract.*

The married woman has no property, and therefore she can make no contracts. But this incapacity to contract rests simply upon her proprietary disabilities; for it is quite clear that a woman is not made personally incompetent by marriage. Thus a married woman could be an executor and deal like any one else with the property thus held by her *en autre droit.*[1] It is the fact that the married woman's incapacity to contract rests only upon her proprietary disability which has permitted its modification in cases where she contracts as agent of the husband. Until quite the end of this period the law was somewhat uncertain as to the exact rationale and bearings of this exception. A case cited by Fitzherbert from a Year Book of 34 Ed. I. is perhaps our earliest definite authority upon this matter.[2] It runs as follows: "A man brought debt and counted that the wife of the defendant obtained from him ten quarters of corn which came to the profit of the defendant (the husband); and the defendant demurred to this count on the ground that the contract of the wife was void, that the wife was not liable on such a contract, and that therefore the husband was not liable. It was said that the case is not similar to the case where an abbot buys something which comes to the profit of the house, by reason of which he is bound by the contract, and his successor also, if he had the profit. It was adjudged that the plaintiff should take nothing. But if he had said that the defendant, through Alice his wife, had received so much to his profit, he would have recovered."

The statement that money or goods "had come to the profit of" the husband was often used in argument in order to fix him with liability on his wife's contract;[3] but the phrase was too vague. It barred out certain cases; but it did not supply a sufficiently accurate test. Suppose the goods had been profitable to the husband, but had yet been supplied contrary to his wish. Suppose, for instance, that an adulterer had carried off the wife, and decked her out in new clothes, and that then the wife had returned to the husband and had worn the clothes—could it be said that he must pay if sued by the person who had supplied them?[4] Then, again, the analogy with the person professed, who was dead in the law, was a tempting analogy, and lived long,[5]

[1] Co. Litt. 351b. See Johnson v. Clark [1908] 1 Ch. at pp. 312-318 for an excellent exposition of the common law principle by *Parker*, J.

[2] Fitz., Ab. *Dette* pl. 163.

[3] The Eyre of Kent (S.S.) ii 46-47; Y.B. 6 Ed. II. (S.S.) 155.

[4] Y.B. 11 Hy. IV. Mich. pl. 27, "*Hankford.*—Si un advowterer prent le feme d'un home et luy vest bien de novel draps, le baron reprendra le feme ovesque les draps."

[5] See Y.B. 20 Hy. VI. Hil. pl. 19 (p. 21) when it is used by Markham.

because it could be usefully employed to illustrate the married woman's delictual liability; but it had little bearing upon her contractual capacity. The fallacy underlying it had been exposed by Bereford, C.J., in 1312;[1] and as late as the reign of Henry VII. it was necessary to expose it again.[2] As the Year Books point out, the wife, though suffering from proprietary disability, is yet a living person, and capable of various activities. It gradually came to be seen that the real ground of the married woman's incapacity to contract was her incapacity to own property on her own account. But she could, as we have seen, own property in *autre droit;* she could act as the agent or servant of her husband; and, that being the case, her contracts, if previously authorized or subsequently ratified by him, were valid, because they were his contracts.[3] The validity of her contracts therefore depended upon the question whether she had made contracts as the agent of her husband, and whether these contracts had been previously authorized or subsequently ratified by him. In Henry VII.'s reign this was clearly stated by Fineux, C.J.[4] "If," he said, "a married woman makes a contract, or buys anything in the market, the contract is void. . . . But my wife can buy a thing to my use, and I can ratify that; and so, if I command my wife to buy necessaries, and she buys them, I shall be bound by reason of my general authority given to her. And if my wife buys things for my household, such as bread, etc., and I know nothing of it, even though they be consumed in my household, I shall not on that account be charged." It is clear that the law has by the end of this period arrived at its final position. These principles were more elaborately stated, but substantially reproduced, in 1663 in the case of *Manby v. Scott.*[5] But, since the case of *Manby v.*

[1] "The cases are not similar. For in the one case the woman is, in virtue of her profession, as one that is dead, so that she cannot claim aught by way of law. But in the other case the wife can claim along with her husband and otherwise," Y.B. 5 Ed. II. (S.S.) 212.

[2] Y.B. 27 Hy. VIII. Mich. pl. 3, "Et n'est semble al cas ou on fist contract ove un moin, car la est un disabilite en le moin issint que l'agrement du Soveraine ne poit faire ceo bon; mes issint n'est en une femme coverte; donques si c'est assumption soit bon tanque le baron disagre, et il appiert ici que le baron ad agre, pur que ce agreement fait l'assumption bon;" to the same effect Y.B. 3 Hy. VI. Hil. pl. 1 *per* Babington, the wife is not a "mort person en ley;" for the status of the person professed, see P. and M. i 416-419; and for some modifications of the theory that the person professed was wholly dead see Y.B. 5 Ed. II. (S.S.) (1312) xxxvi.

[3] "Un femme coverte n'ad ascun volunte, mes la volonte del baron est sa volonte; et donques quand le baron agre a un acte fait per sa femme, cest agrement fait cest l'acte le baron," Y.B. 27 Hy. VIII. Mich. pl. 3. Some perception of this appears as early as 1313 in *Hedon's* argument in the Eyre of Kent (S.S.) ii 48—"We tell you that if any contract were made by our wife it was made *without our consent and against our will;* and we do not think that the husband is liable under a contract made, etc., during coverture."

[4] Y.B. 21 Hy. VII. Mich. pl. 64.

[5] 1 Lev. 4—the report of the case in the King's Bench; 1 Sid. 109—the report of the case in the Exchequer Chamber; 2 S.L.C. (10th ed.) 433.

Scott, one exception has been engrafted on to the law. Holt, C.J., decided in the case of *James v. Warren* in 1707 that if a man wrongfully deserts his wife, and leaves her destitute, she is his "agent of necessity" and can pledge his credit for necessaries.[1] Up to that time, and according to the opinion of the majority of the judges in *Manby v. Scott*, the wife had in these circumstances no remedy at common law, but only a remedy in the Chancery or in the ecclesiastical courts.[2] But there was a strong dissentient minority—the majority of the judges in the King's Bench,[3] and the minority of the judges in the Exchequer Chamber,[4] holding that she had also a remedy at common law. Though this minority opinion was probably new law, and inspired by a desire to encroach on the province of the Chancery and the ecclesiastical courts, it was endorsed by Holt, and has become a settled principle of the modern common law.[5]

(iii) *Criminal and civil liability.*

The married woman's capacity to commit crimes is almost normal.[6] Even at the present day the effect of marriage upon criminal liability is small; and in Bracton's day it was still smaller. In his day the married woman was not guilty as an accessory merely because she received and sheltered her husband, nor was she bound to accuse him of a felony which to her knowledge he had committed;[7] and later it was decided that she could not be guilty of stealing from her husband.[8] But in other respects marriage made no difference.[9] The law remained the same with respect to the more heinous crimes, such as treason or murder;[10] but, later, it was slightly altered in the case of certain other crimes, such as burglary or larceny, by the growing tendency of the judges to presume that such crimes, if committed in her husband's company and by his command, were committed under his coercion.[11]

[1] "If a man runs away from his wife, or turns her away, and leaves her not wherewithal to maintain herself, then he gives his wife credit for money or necessaries," Holt (K.B.) 104.

[2] "Que (coment le feme ne poiet lier le baron per sa contract uncore) la feme nest destitute de remedy, sed per le common ley le Chancery poit order luy necessaries vel al miens le cannon ley (que est subservient a ceo) in le Spiritual Court," 1 Sid. at p. 124.

[3] 1 Lev. at pp. 4-5.

[4] 1 Sid. at pp. 111 seqq.

[5] Montague v. Benedict (1825) 3 B. and C. at p. 635 *per* Bayley, J.; Debenham v. Mellon (1880) 6 A.C. at p. 31.

[6] Cp. Fitz., Ab. *Corone* pl. 383.

[7] f. 151b; Staunford, P.C. i. c. 19; and cp. the record of 37 Ed. III. cited by Hale, P.C. i 47.

[8] Fitz., Ab. *Corone* pl. 455, citing a report of Hil. 21 Hy. VI.; Hale, P.C. i 516.

[9] Bracton f. 151b, "Desicut sunt participes in crimine, ita erunt participes in pœna."

[10] Hale, P.C. i 45.

[11] Fitz., Ab. *Corone* pl. 160 (M. 2 Ed. III.) the law seems doubtful; ibid pl. 199 (27 Ass. 40) the rule is acted on.

But, of course, this did not apply where these conditions were not present; and if they were present, the presumption was rebuttable.[1] It is said that the fact that the woman could not plead her clergy made the judges the more willing to allow her the benefit of this presumption.[2]

We have seen that the principles which underlie civil liability are very different from those which underlie criminal liability.[3] Hence the rules as to the civil liability of the married woman are far from being normal. They are based mainly upon the two principles (1) that the married woman is capable of committing a wrong, and (2) that she has peculiar proprietary disabilities.

Marriage is a gift of the wife's chattels to her husband. It is only fair, therefore, that the husband who takes the benefit should bear the liability. Hence the husband could be made liable in a joint action for his wife's ante-nuptial debts[4] and torts. But the debt or tort is his wife's; and the liability therefore only attaches to him *qua* husband. Therefore if she dies he ceases to be liable; and if he dies this liability does not attach to his executors.[5]

On similar principles, if the wife committed a trespass to the person during the marriage she was in theory liable;[6] and that liability was enforced in a joint action against husband and wife.[7] "If a married woman," runs a note in the Register, "beats a man or another woman, the name of the husband must be inserted with the name of the wife in the writ, though he is not guilty."[8] But seeing that the liability was the wife's, here too the husband's liability in respect of his wife, ended with the marriage.[9] If the wife committed a tort in respect of realty (such as disseisin or

[1] Hale, P.C. i 46.

[2] There is a curious case noted in Fitz., Ab. *Corone* pl. 461 in which apparently a woman had her clergy; Hale, P.C. i 45, 46, does not altogether approve of the theory in the text.

[3] Above 373-377.

[4] The Eyre of Kent (S.S.) ii 44-45, 48; Y.B. 4 Ed. II. (S.S.) 153-154—in all these cases the principle is assumed.

[5] Y.BB. 19 Ed. III. (R.S.) 390, 392; 49 Ed. III. Mich. pl. 5; 12 Hy. VII. Trin. pl. 2 (pp. 23, 24); 20 Hy. VI. Hil. pl. 19, "Mettons que feme sole soit oblige a moy, etc., et prend baron, le baron sera charge del debte durant la vie sa feme; mes si elle devie, le baron est discharge. Et en mesme le maniere un home fait a moy trespass, et entre religion, l'abbe sera charge vers moy durant la vie son Commoin, et s'il devie, devant que jeo recovre, l'abbe sera discharge;" cp. also 9 Ed. IV. Trin. pl. 32. In respect of civil liability for tort the parallel with the person professed was close, P. and M. i 419.

[6] Y.B. 36 Hy. VI. p. 1 pl. 1 *per* Prisot, C.J., "Si brief de trespass de batery soit port envers le baron et sa feme, supposant que ils deux aura batu le plaintif, et le baron appiert, et la feme nemy, le baron respondra sans la feme, pur ceo que l'action est port auxi bien de son tort, *come de le tort de sa feme;*" cp. 39 Ed. III. Trin. p. 18; Fitz., Ab. *Trespass* pl. 208; 30 Ass. pl. 19.

[7] Y.B. 36 Hy. VI. p. 2, "Le baron poit respondre sans feme, mes nemy e contra."

[8] Register f. 105b—the rule is the same in the case of the person professed.

[9] Above n. 5; cp. *Re* Beauchamp [1904] 1 K.B. at p. 581.

waste) jointly with her husband, she was equally guilty with him; and she could be sued after the husband's death if she took the benefit of the tort by remaining in possession of the land in respect of which the tort was committed.[1] On the other hand, as she could own no chattels, it seems to have been thought that she could not be guilty of the tort of appropriating them.[2]

The civil liability of husband and wife for the wife's trespasses to the person, and perhaps to goods, was probably the same whether the tort was ante- or post-nuptial; and the same principles were applied, as we have seen, to their liability for the wife's ante-nuptial debts. Very different was the rule as to liability for the wife's post-nuptial debts. As we have seen, the wife's contract was void, unless she had contracted as the agent of her husband. Unless, therefore, the husband was liable, there was no liability at all.[3]

Thus, at the end of this period, the common law had, by a series of logical deductions from a few fixed principles, evolved a wholly original set of rules as to the status of married women. Unfortunately these few principles attained to fixity at too early a period. Following the line of least resistance, the law rejected all idea of a community of property between husband and wife, and lost thereby the opportunities for development which are afforded by a system which recognizes such community. The married woman could own no personal property. She could therefore make no contracts on her own account, and her husband was made liable for her torts. She lost all power over her realty during the marriage; and the refusal by the common law to recognize the interest of one for whom another holds property in trust prevented any variation or deviation from these strict rules by means of settlements or agreements made before marriage. Her rights after the death of her husband might be affected in this way, but not her rights during the marriage. On the other hand, systems which recognize such community were able to give effect to newer ideas which limit the husband's control in the interest of the wife; and they were able to give effect to agreements

[1] Y.B. 39 Hy. VI. Hil. pl. 8 *per* Laicon, "Si le baron et sa feme disseisent un home, et Assise est port vers eux, et le pleintif recovre, et le baron devie, execution sera fait envers le feme de damages si bien come de principal . . .;" *per* Prisot, C.J., "Si le baron et sa feme ont un mesme occupacion, et le baron devie, la feme sera charge per le Statut de Gloucester per le mesne occupacion en la vie son baron en Assise ou per brief de Trespass: car les profits seront ajuges a luy en Ley si bien come a son baron."

[2] Fitz., Ab. *Briefe* pl. 644 (13 Rich. II.), detinue sur trover should be brought against the husband alone; Y.B. 38 Ed. III. Hil. pl. 1, the same rule as to detinue sur bailment; there seems to be no reason why the woman should not be liable for *trespass* to goods as much as for trespass to the person—but I have found no clear authority, cp. last note.

[3] Above 529.

made between the parties before marriage. The common law had no place for these ideas, and therefore the alterations in the status of the married woman which a changed order of ideas demanded were unable to take place within its sphere. They were made in the rival system of equity, which gave effect to the demand for an improvement in the status of the married woman by creating for her a peculiar proprietary capacity.[1] But the system which equity constructed was developed in a spirit of direct antagonism to common law rules; and therefore the law on this subject came to consist of two halves more than usually divergent. The equitable rules were designed for the purpose of giving rights to the married woman. They therefore subjected her to very few liabilities. Her liabilities remained for the most part as at common law. No alteration was made in the rules as to her liability for crime and tort; and such liability upon her contracts as the rules of equity permitted was a carefully guarded liability. The position, therefore, of the married woman became as unduly advantageous in equity as it was unduly disadvantageous at common law. When the legislature adopted the equitable rules, and applied them with some modifications to all married women, many curious legal rules, many doubtful problems, and some injustice resulted from the imperfect fusion of these two antagonistic sets of legal principles.

[1] For the beginnings of the rules of equity on this subject see Bk. iv. Pt. I. cc. 4 and 8.

CHAPTER V

SUCCESSION TO CHATTELS

IN all branches of the mediæval common law there was a great dividing line between the rules of law relating to things which could be recovered by the real actions and the rules relating to things which could be recovered by the personal actions. In the law of succession to chattels that dividing line has been deepened and perpetuated, firstly by the action of the common law courts in abandoning jurisdiction over large parts of it, secondly by the action of the ecclesiastical courts in assuming that jurisdiction, and thirdly by the action, in later times, of the court of Chancery in encroaching upon the jurisdiction both of the common law and of the ecclesiastical courts.[1] The differences between rules of law resulting from development within the real or personal scheme of actions were great: the differences resulting from development, not merely within different schemes of actions belonging to the same jurisdiction, but within several wholly different jurisdictions, were necessarily far greater and more permanent. It is for this reason that the differences between realty and personalty were, since the disuse of the real actions, most marked in the law of succession. In this, as in other branches of English law, the law courts have developed a system of rules from a basis of primitive custom; but in this branch of the law these rules have been developed, not by one set of courts administering one set of principles, but by three sets of courts administering respectively the principles of the common law, the principles of the canon law, and the principles of equity; while the principles of equity were themselves a mixture of the principles of the common law, of the canon law, of the discretion of the chancellor, and, later, of the practice of the court of Chancery as fixed by decided cases. The line between these jurisdictions has always been a somewhat wavering line. There have been at different periods many encroachments or attempts at encroachment along debatable frontiers. There has also been much borrowing of principles and rules, which, when borrowed, have been modified in the jurisdiction to which they have been transplanted. Hence it is that the law of

[1] Vol. i 625-630.

succession is historically one of the most variegated, and, therefore, one of the most complicated of all branches of English law.[1]

In this period there are only the efforts of two sets of courts—the common law and the ecclesiastical—to be considered. In the ensuing sections I shall try to give some account of the manner in which they have laid the foundations of the present law. My arrangement of the subject will be as follows:—§ 1. The Last Will; § 2. Restrictions on Testation and Intestate Succession; § 3. The Representation of the Deceased.

§ 1. The Last Will[2]

We have seen that in the latter half of the thirteenth century wills of realty had become legally impossible unless they were allowed by some special custom.[3] Wills of personalty, on the other hand, were not only legal but usual; for, unless death was so sudden that there was no opportunity for confession, to die intestate was probably to die unconfessed; and of the future state of a person who had thus died there could be no sure and certain hope.[4] Thus there arose a feeling that intestacy, except in case of sudden death, was disgraceful. We have seen that there are traces of this feeling as early as the reign of Cnut.[5] It was intensified after the Conquest. Though Henry I. had promised in his charter[6] that the chattels of an intestate who had died suddenly should be distributed by the wife, children, and men of the deceased for the good of his soul, Glanvil asserts that the lord was entitled to all the chattels of his man who had died intestate.[7] Though Magna Carta[8] had enacted that a distribution of an intestate's goods should be made "per visum ecclesiæ," so prevalent was the feeling against intestacy that Bracton was obliged to insist that the lord could not seize the goods of his man who had died suddenly and intestate, and that such a person was not necessarily deserving of punishment.[9] That

[1] See Swinburn, Testaments Epilogue, "All the limmes and bones of this my testamentarie picture, were not only heretofore out of joint; but scattered and dispersed farre asunder, some amongst the laws civill, some amongst the decrees and decretals, some amongst our provinciall constitutions, and some amongst the lawes, statutes, and customes of this Realme."

[2] There are many wills of this period already in print, see Testamenta Eboracensia (Surt. Soc.); Richmondshire Wills (Surt. Soc.); Wills and Inventories (Surt. Soc.); Furnivall, The Fifty Earliest English Wills in the Court of Probate, London (Early Engl. Text Soc.); Nicolas, Testamenta Vetusta; Sharpe, Calendar of Wills in the Court of Hustings. For some specimens of different dates see App. IV.

[3] Above 75-76, 271.

[4] P. and M. ii 354-357; vol. i 626-627; that the horror of intestacy did not exist in case of sudden death is, I think, proved by Gross, Mediæval Law of Intestacy, H.L.R. xviii 120, 121.

[5] Vol. ii 93.

[6] § 7.

[7] vii 16.

[8] (1215) § 27; vol i 626.

[9] f. 60, "Item si liber homo intestatus et subito decesserit, dominus suus nil intromittat de bonis defuncti, nisi de hoc tantum, quod ad ipsum pertinuerit, id est

there was real need to state this rule is apparent from the stories of the chroniclers,[1] and the extensive claims made by the pope[2] and by feudal lords.[3] Thus it happened that the majority of persons who, having property to leave, died peaceably and regularly, died testate.

We have seen that in this period jurisdiction over the probate of such wills belonged to the ecclesiastical courts.[4] Matters relating to their making, revocation, and interpretation fell also within their jurisdiction. For this reason the greater part of the law relating to them was developed under the influence of the canon or civil law. But at the end of this period many of the rules so evolved were recognized and accepted by the common lawyers; while in other cases these rules were altered or modified to suit the principles of the common law. In this way the law relating to wills, though evolved by a different set of courts and under the influence of a different set of ideas, was becoming an integral part of English law—a process assisted by the fact that, as the church had not got this large testamentary jurisdiction abroad, the canon law had no very general rules upon these matters.[5]

In this section I shall deal, firstly, with the making, the revocation, and the interpretation of a will; secondly, with the capacity to make a will; and thirdly, with some of the clauses found in wills of this period.

The Making, Revocation, and Interpretation of a Will

After the Conquest, as before, we get documents of a very indeterminate character, which partake quite as much of the character of settlements or conveyances as of wills.[6] Indeed, there is very little distinction to be drawn between them and wills. The ordinary conveyance, for instance, often took the form of a royal writ;[7] and Henry II. left a will in this form.[8] But by the beginning of the thirteenth century the will had become differentiated from other forms of conveyance by the fact that it appointed executors. Glanvil recognizes their appointment as a usual part of a will;[9] and though executors were not appointed *eo*

quod habeat suum herioth, sed ad ecclesiam et ad amicos pertinebit executio bonorum, nullam enim meretur pœnam quamvis decedat intestatus;" Gross points out (H.L.R. xviii 127) that in spite of Bracton's words many boroughs thought it necessary to have in their charters an express provision that the goods of burgesses dying intestate should not be confiscated.

[1] P. and M. ii 355, 356.
[2] Ibid 357; Bl. Comm. ii 495.
[3] Gross, H.L.R. xviii 124, 125.
[4] Vol. i 625-626.
[5] Ibid 629.
[6] See e.g. Ramsay Cart. i 252 (1133-1150); vol. ii 95.
[7] Above 226.
[8] Madox, Form. no. 767; Nicolas, Test. Vet. 1-4.
[9] vii 6, "Testamenti autem executores debent ii quos testator ad hoc elegerit et quibus curam ipsam commiserit. Si vero testator nullos ad hoc nominaverit possunt propinqui et consanguinei ipsius defuncti ad id faciendum se ingerere."

nomine in Henry II.'s will, legacies were left to be distributed in pious uses "by the hand and view" of certain named persons.[1] In King John's will,[2] and in other wills of almost the same date,[3] there is an appointment of executors. There is reason to think that the appropriation by the ecclesiastical courts of jurisdiction over matters testamentary in the thirteenth century tended to give greater prominence to this characteristic of a will, and to differentiate completely wills of chattels from other forms of conveyance. For, though the origin of the executor must be looked for in regions far removed from the influence of Roman law,[4] the civil and canon lawyers who sat in the ecclesiastical courts naturally identified the executor with the *hæres* of Roman law; and, under the influence of the clear Roman rule, which laid it down that the essence of a *testamentum* was the appointment of an *hæres*, they laid it down that, though there might be an expression of the *ultima voluntas*, there could be no true *testamentum* without the appointment of an executor. This rule was laid down by Lyndwood in the fifteenth and by Swinburn in the latter part of the sixteenth century;[5] and it is repeated by West at the beginning of the seventeenth century.[6] But, seeing that in the absence of an executor the *ultima voluntas* would be given effect to by the ordinary[7] by means of the appointment of an administrator,[8] the rule became meaningless and disappeared. Similarly the codicil, which, if it existed with a *testamentum*, was treated as part of it, was regarded, if it stood alone, merely as an *ultima voluntas*.[9]

The will might be either written or nuncupative, i.e. verbal; or partly written and partly nuncupative.[10] It followed therefore that

[1] P. and M. ii 332, 333. [2] Nicolas, Test. Vet. 5.

[3] Ibid 47 (will of William Marshall, Earl of Pembroke, 1219); Madox, Form. no 768.

[4] Below 563-564.

[5] Lyndwood 172 sub voc. *Intestatis;* 173 sub voc. *Voluntatem Ultimam;* cp. Swinburn 8b, "Now if you will aske me what kind of perfection, or what speciall thing this is, without the which the wil how perfect soever otherwise is no testament. . . . It is the naming or appointment of an Executor (who in the civil law is called Hæres, heire). This is said to be the foundation, the substance, the head, and is indeed the true formall cause of the Testament, without which a will is no proper Testament." The first edition of Swinburn's book was published in 1590.

[6] "A testament is defined by most men 'voluntatis nostræ justa sententia de eo quod quis post mortem suam fieri velit,' for the perfecting of which definition it seemeth good to add these words, 'cum executoris institutione,' for without an executor there can be no testament, for the appointment of an executor is the true formal cause thereof, giving essence thereunto," Symboleography (Ed. 1615) Pt. I § 633.

[7] Lyndwood 166 sub voc. *Legitima Testamenta*, "Quædam sunt illegitima ratione Solemnitatis non servatæ, et talia nihilominus Executioni demandari debent."

[8] Below 566-567.

[9] Lyndwood 173 sub voc. *Ultimam Voluntatem;* 175 sub voc. *Testamenta et Voluntates;* Swinburn 13-15; sometimes a testator will expressly refer to codicils which he may afterwards make, Test. Ebor. i 355.

[10] A late illustration of this rule is to be found in S.P. Dom. (1635) 129, ccxc 112; the following case is there stated:—"A, being sick, sends for B to make his will, and

to a written will a verbal codicil might be annexed. Sir Giles Dawbeney, knight, on March 3rd, 1444, wrote his will with his own hand and sealed it with his seal.[1] The will contained no residuary bequest; "wherfor aftirward, that is to say the xi day of Januar', the year of our Lord Mccccxlv, at Barington, to the seid Sir Giles ligging in his sekenesse, wherof he died sone aftir the same day, Sir Robert Wilby prest, his goostly fadir, saide, 'Sir, ye have maad a testament, and bequethid many things to diverse personis, making no mencion whoo sholde have the residue of your goods that be noght bequetid; will ye vouche saaf to say who shal have it?' Forthwith the seid knight without any taryyng said, 'My wif shal have it.' This was his last wille."[2] It was proved as such in the following March.

The written will might take various forms. Either the whole will or the attestation clause might be written, signed, and sealed by the testator.[3] But neither signature nor seal was necessary if it could be proved to be his will.[4] It might be written by some one for him and acknowledged as his will;[5] but whether or not written by the testator himself, it was generally in the first person.[6] It might take the form of a solemn notarial instrument,[7] or it might be somewhat in the nature of a letter of request.[8] There is an instance of a will in the form of a deed poll.[9] Sometimes it was stated that as the testator's seal was not well known the seal of some better known man had been affixed.[10] In many cases, no doubt, it was written by the parson for his dying parishioner. A common form of will for the guidance of such persons was known.[11] As Swinburn says,[12] and his remark was doubtless as true then as

informs him that he designed B himself and C to be executors. A states to B the particulars of various intended legacies which B writes down, but he does not take any written note of the appointment of executors. A becomes worse and dies, the question was whether this was a good appointment of B and C as executors;" eight lawyers certified that the will and the appointment of executors were valid.

[1] Test. Ebor. ii 110-113. [2] Ibid 113, 114.

[3] Ibid iii 309, 310, "In witness wherof I, the said Sir Henry Percy, erle of Northumberland, have to this my present last will and testament . . . writon this with myn awn hand, and signed with my signe manuell and sealed with the seale of myn armes and signett;" ibid iv 96; Furnivall 90, "writen with myn owen honde."

[4] Lyndwood 174 sub voc. *Probatis*.

[5] Test. Ebor. iii 295, "In the presence of the above written Thomas Sayvell squyer (the testator), Thomas Browne scryvener of London, writer of thies presentes, William Ermitage, citezeine and cupholder of London;" iv 96; Wills and Inventories 73—a legacy to the writer of the will.

[6] Wills in the third person are comparatively rare, see for instances Madox, Form. nos. 768-771; Test. Ebor. i 47.

[7] Wills and Inventories 45.

[8] Test. Vet. 304—will of William, Earl of Pembroke (1469), in the form of a letter of request to his wife.

[9] Wills and Inventories 104 (1516).

[10] Test. Ebor. i 110 (1380); Test. Vet. 321 (1476).

[11] It occurs in Bishop Lacy's Liber Pontificalis, see Furnivall, 67 n., 135-136.

[12] At p. 28.

it is now, "it is received for an opinion amongst the ruder and more ignorant people that if a man should chance to be so wise as to make his will in his good health when . . . he might ask counsell of the learned, that then surely he should not live long after." At the end of this period, however, when, by means of uses, it was possible to make elaborate settlements of real estate,[1] men of property would be obliged to take much thought over their dispositions. Sometimes they expressly directed that a lawyer was to be consulted as to the best mode of giving effect to them.[2]

The nuncupative will was proved by the testimony of witnesses. Lyndwood[3] tells us that there ought to be two honest witnesses who can clearly depose to the testator's dispositions. There is no need that one of them should be the parish priest (unless some local custom demands this) nor that the will should contain a bequest to pious uses, nor that the witnesses should have been specially summoned for this purpose—for "justice demands that the clear intentions of the deceased be carried out." It is clear both from the wills which have come down to us and from the Year Books that these words of Lyndwood represented the law of his day. We can see a good illustration in the account of the manner in which the nuncupative will of Sir William Crathorne was proved in 1346.[4] It would seem, however, that in the fourteenth century the fact that the will had been proved in the ecclesiastical court would not be conclusive as to its validity in a court of common law. The jury must be satisfied that there was a will and that it was the will of the deceased.[5] But at the beginning of the following century a grant of probate by the ecclesiastical courts was given its modern conclusive effect by the common

[1] For specimens of these settlements see Test. Vet. 310-322; Test. Ebor. i 236; ii 154-156, 216, 221, 242, 254, 279; iii 43, 274, 307.

[2] Furnivall 62 (1425) a gift to uses was directed to be made by fine, "for more suerte;" 64. estates were to be made by "the avys of a wel lerned man of the lawe;" Wills and Inventories 53, "Et fiat securitas de dicta summa annuatim solvenda per tempus prædictum juxta peritoris avisamentum in jure regio"—the reason for this caution being that, "religiosi reddunt se difficiles in solucionibus suis."

[3] 174 sub voc. *Probatis*.

[4] Test. Ebor. i 21, "Memorandum quod vii die mensis Nov. Anno Domini mcccxlvi constituta erat coram Commissario domini Archiepiscopi apud Cawode Domina Isabella relicta domini Willielmi de Crathorne militis . . . asserens dictum maritum suum testatum decessisse, et petens ut ad probationem hujus testamenti admitti possit; qua admissa produxit in testes Dominum Rogerum Greteheved et Petrum Bagot, qui jurati et examinati. dicunt et deponunt quod dictus Dominus Willielmus de Crathorne quodam certo die ante festum exaltacionis Sanctæ Crucis ultime preteritum, de quo non recolunt, in ecclesia de Crathorne personaliter constitutus suum condidit testamentum nuncupativum sub forma infra scripta;" cp. ibid 74, 303.

[5] "*Bereford*, C.J.—The Ordinary's letter would have no authority in this court since no letter was granted to them to certify his Court that they were executors. *Howard*.—The Ordinary's letter would be evidence of that. *Bereford*, C.J.—It would not serve as proof; but averment of a jury would be a sufficient proof," the Eyre of Kent (S.S.) ii 55.

law courts. In 1426 a will under the seal of the ordinary was held to be valid in the common law courts.[1]

That a will was always and under all circumstances revocable was clearly held by the ecclesiastical lawyers. Whether the older amorphous instruments, which were as much conveyances as wills, were revocable may well be doubted.[2] Even in later times we sometimes find testators expressly reserving a right to revoke.[3] This was perhaps a survival of older ideas; and it was certainly unnecessary. John of Ayton[4] tells us that even if a testator expressly states in his will that no other will should be valid, or if he swears not to revoke, the will is not irrevocable. A man cannot thus deprive himself of the power of testation, because, if he could, he would be changing the law which confers this power on all persons not expressly made incapable.[5] It may be that he will render himself liable to ecclesiastical censures for his perjury if, contrary to his oath, he makes a second will. None the less the second will holds good.[6] These principles were accepted and acted on by the common lawyers of this period,[7] and have become an integral part of English law.[8] As to the various modes in which a testament or a legacy could be revoked many of the rules of Roman law were borrowed. Some of them are at the present day recognized by the Wills Act and by the rules of equity.[9]

The interpretation of the will was at this period a branch of the ecclesiastical jurisdiction. It was not till the rise of the equit-

[1] Y.B. 4 Hy. VI. Mich. pl. 3; but nothing beyond what was proved before the ordinary could be put in evidence, Y.B. 2 Ed. IV. Mich. pl. 1.

[2] Vol. ii 95-96.

[3] Furnivall 28—Th. Broke (1417) reserves to himself power to alter or revoke; Test. Vet. 320, 321—Margaret, Lady Hungerford (1476); Test. Ebor. i 353 (1409).

[4] At p. 109; Lyndwood 163 sub voc. *Voluntate testandi*, "Non valeret pactum quod posset impedire liberam Testamenti factionem. Ratio est, quia est contra bonos mores, unde non valeret etiam in eo casu juramentum;" for a clause revoking former wills see Wills and Inventories 66, 67.

[5] "Testamentum publici juris est, unde cum sic concernat rempublicam, ejus libera factio contra dispositionem juris auferri non potest."

[6] "Non obstante etiam juramento testatoris super non mutando testamentum primum, tenet tamen secundum; licet pœnitentia ei imponatur de perjurio, quando sine causa mutavit."

[7] The rule seems clearly implied in 44 Ass. pl. 36; it is stated in Y.BB. 34 Hy. VI. Mich. pl. 16 (p. 7); 36 Hy. VI. pp. 7, 8; Vynior's Case (1610) 8 Co. Rep. 82a.

[8] Dufour v. Pereira, 2 Hargrave, Juridical Arguments 304; Walpole v. Orford (1797) 3 Ves. 402; Hammersley v. de Biel (1845) 12 Cl. and Fin. 45.

[9] Swinburn, Testaments Pt. vii, recognized as modes of revoking a will: (1) a later will § 14; (2) revocation or cancellation of the will §§ 15, 16; (3) alteration of the state of the testator § 17; hindering the testator from making another will § 18; as modes of revoking a legacy, ademption or translation §§ 20, 21; various circumstances connected with the legatee, as his death or enmity to the testator § 22. The Wills Act, 1 Victoria c. 26, recognizes as modes of revocation marriage, acts of physical destruction, a subsequent will, a writing executed like a will; ademption of legacies is a well-known doctrine of equity; and the death of the legatee before the testator (except in certain cases provided by the Wills Act) revokes the legacy.

able jurisdiction of the chancellor that any serious inroads were made upon it. The guiding principle was, as we have seen, the intention of the testator;[1] but there was much to be found in Roman law as to the interpretation to be placed upon various kinds of conditional legacies or stipulations. These rules were borrowed by the ecclesiastical lawyers, and applied by them both to appointments of executors and to gifts of legacies.[2] Many of these rules were adopted by the court of Chancery, and by the courts of common law when they were obliged to deal with wills of real estate. As developed by a system of case law they tended to become a fixed body of law which often effectually prevented the fulfilment of the real intentions of the testator, and sometimes actually contradicted them. The aid of the legislature,[3] and an altered view of the binding force of cases interpreting the clauses or the words of particular wills, have in our own days restored the intentions of testators to their rightful sovereignty.

The Capacity to Make a Will

The ecclesiastical lawyers laid it down that all persons were capable of making a will, unless they were disabled by some special rule of law. Of those disabled Lyndwood[4] knew five classes. There were those disabled "propter defectum suæ potestatis," as a son, a slave, or a monk; those disabled "propter defectum mentis," as the impubes, the madman, or the prodigal; those disabled "propter defectum sensualitatis," as the blind, deaf, or dumb; those disabled "ratione pœnalitatis," as those condemned of crimes which rendered them intestabilis; and those disabled "ratione dubietatis," that is, by reason of some doubt as to their status. Many of these classes were taken from the Roman law and were wholly inapplicable to the conditions which prevailed when Lyndwood wrote.[5] English law knew neither filii-familias, nor servi, nor prodigi; nor did blindness, deafness, or dumbness necessarily cause any testamentary incapacity under the prevailing rules or want of rules as to the formalities required in the execution of testaments. To enumerate such incapacities as these merely proved the enumerator to be a learned Romanist who knew his authorities. It might be necessary, for the sake of completeness, to set down such rules if one were writing a book about these

[1] Lyndwood 174 sub voc. *Probatis*, "Cum omnis suadeat æquitas ut indubitata voluntas defuncti impleatur;" above 274.

[2] Swinburn Pt. iv §§ 6-15.

[3] 1 Victoria c. 26 §§ 28-33.

[4] At p. 173 sub voc. *Propriarum uxorum;* at p. 167 sub voc. *Condere Testamentum.*

[5] Cp. Swinburn Pt. ii; Bl. Comm. ii 497-499; in Blackstone's account the lists of the ecclesiastical lawyers are adapted to the needs of the practical English lawyer.

matters; they could be comfortably ignored when it came to actual practice.

There were, however, three practical cases in which the ecclesiastical lawyers laid down rules as to testamentary capacity which differed from the rules of the common law. These were the cases of the villein, the married woman, and the infant. In all these cases, after a shorter or a longer period, the rules of the common law have prevailed.

The villein was not a slave.[1] He was identified by the ecclesiastical lawyers with the *ascripticius glebæ;* and therefore, being free, they laid it down that he could make his will.[2] But, as we have seen, the villein was not free as against his lord.[3] His lord might, if he pleased, seize his goods. It is true that if his lord did not seize them he had a good title to them as against the rest of the world. But to have allowed the villein absolute freedom of testation would have prevented the lord from exercising his rights on the villein's death. Lords therefore protested against allowing this freedom of testation;[4] and it was finally decided that, though the villein could make his will, and though that will would take effect if the lord did not choose to exercise his rights, the lord could defeat the will by exercising his rights at any time before probate of the will had been obtained.[5]

The case of the married woman was far more difficult. We have seen that the common lawyers had denied the married woman any power to own chattels, and had thus made a short cut to the solution of a difficult problem by the process of ignoring many older ideas which conflicted with their doctrine.[6] In particular that doctrine ran wholly counter to ideas drawn from Roman sources. The logical consequence of the views of the common lawyers was the denial to married women of all testamentary capacity, for it is useless to say that a person may make a will if she has nothing to leave.[7] The logical consequence of the views of the ecclesiastical lawyers was to allow to married women the normal testamentary capacity. A constitution of John

[1] Above 491 seqq.

[2] Constitution of Stratford (1342), Lyndwood 171-179, against which Parliament protested in 1345, R.P. ii 149.

[3] Lyndwood recognized this fact; but he does not seem to think that it affects their general testamentary capacity; at p. 172 sub voc. *Ascriptitiorum*, he says, "Et nota quod hujusmodi Ascriptitii sunt Liberi. Nec obstat, quia quoad Dominos non differunt a Servis, sed quoad Extraneos sic. Et tales Testamentum condere possunt."

[4] Above n. 2.

[5] Swinburn 47b, 48.

[6] Above 526-527.

[7] As *Martin* put it in Y.B. 4 Hy. VI. Trin. pl. 11, "Lequel seroit inconvenient a doner a un ascun chose, lequel le donor meme ne purroit avoir, et que le don sera bon;" or as Lyndwood put it, 173 sub voc. *Propriarum uxorum*, "Habent enim pro se opinionem, quod uxor nulla bona habet unde testari possit, sed omnia ad maritum pertinent, sicque sine mariti licentia uxor non potest condere testamentum."

Stratford made in 1342, and re-enacting an earlier constitution of 1261, represents the latter point of view, and denounces those who impede or cause to be impeded the wills of villeins and married women.[1] A petition in Parliament of 1345 represents the former point of view and complains of this constitution.[1]

The manner in which Lyndwood[2] discusses the subject illustrates very well the premises from which the ecclesiastical lawyers argued, and their hopeless divergence from the premises of the common lawyers. It is a strange thing, he says, that husbands try to prevent their wives from making their wills. It may be that wives cannot make wills of their husbands' property without their licence, though some hold that they have even this power;[3] for the wife is the partner of her husband's life, and in a manner the mistress of her husband's goods, and therefore should be permitted with her husband's consent to dispose of some part of these goods for the good of her soul. It is clear, too, that husband and wife may both possess property; for on what other hypothesis could the civil law prohibit gifts as between husband and wife, or make provision for the return of the dos on the dissolution of the marriage? It may be that the husband is the owner of the dos while the marriage lasts, and while he properly administers it. But he is not the owner of "res parapherna," which are all goods other than the dos; and of these the wife may make her will.[4]

That these views were not merely the theories of men who had learnt their law from the Code and Digest we can see from extant precedents of wills made by married women.[5] As Bracton had said, husbands would often give such consent "propter honestatem."[6] In fact, the view of the common lawyers ran counter to older ideas as to a married woman's capacity and to practical convenience. The newer ideas which were destined in the future to give birth to the separate estate of the married woman were, it is true, on the side of the ecclesiastical lawyers. But for the present the views of the common lawyers were too strong; for they were able, as Maitland points out, to give effect to their views by maintaining the

[1] Above 542 n. 2; P. and M. ii 426, 427.

[2] At p. 173 sub voc. *Propriarum uxorum.* [3] For this view see below 550, 555.

[4] Lyndwood, loc. cit., "Et sic patet, quod licet in rebus Dotalibus maritus sit Dominus, non tamen sic in rebus Paraphernalibus. Nam res Paraphernales sunt propriæ ipsius mulieris, etiam stante matrimonio . . . de quibus uxor libere testari potest. . . . Et dicuntur bona Paraphernalia quæ uxor habet extra Dotem, et quod de illis bonis maritus non est Dominus, sed remanent sub dispositione uxoris;" cp. Y.B. 7 Hy. IV. Pasch. pl. 10 *per* Thirning, J., for the opposing view.

[5] Test. Ebor. i 22, 33, 36 (1346); 70 (1349); 143 (1390); 146 (1391); 240 (1398); 288, 291 (1402); 338 (1404); ii 162 (1452); Furnivall 103 (1434, 1435)—in this case the husband was abroad; Test. Vet. 78 (1369). In some cases the consent of the husband is expressed, Wills and Inventories 42 (1386); Test. Ebor. i 290 (1402); Test. Vet. 184 (1415). These dates perhaps show the gradual victory of the views of the common lawyers.

[6] f. 60b.

rights of the husband as against the wife's executor.[1] Thus the victory remained with the common lawyers.[2] The wife can make no will because she owns no property. We can see only a few unimportant traces of the views of the ecclesiastical lawyers in the rules that the wife's will of her choses in action not reduced into possession during the marriage is good, if the husband allows it to be proved;[3] and in the rule that the wife's paraphernalia (a term confined by the common lawyers to her necessary clothes and personal ornaments), if not disposed of by the husband in his life, survived to her if the husband died solvent.[4]

We should note that the incapacity of the married woman depended upon the fact that she could own no property in her own right. She was not, therefore, incapable of holding property as executor in the right of another; and of property so held she could make her will. Exactly the same reasoning applies to the case of the villein.[5]

The common law had arrived at these conclusions at the end of this period. Fineux, C.J., said in 1497,[6] "Then as to the question whether a feme covert can make an executor or not, she can do so well enough without the consent of her husband in the case where she is another's executor, or of such things or duties of which (the husband) never had possession, as in the cases above mentioned. And by the spiritual law she can make her executor of some things of which the property and the possession are in her husband, that is, of her personal apparel; and so she can by the common law by the consent of her husband; but without the consent of her husband she cannot, the possession and the property being wholly in the husband; but here the husband has proved his wife's will and that proves his consent." Swinburn's treatise proves that the ecclesiastical courts were obliged to acquiesce in this settlement of the law.[7] The married woman was obliged to wait for the development of the equitable jurisdiction of the chancellor for a fuller measure of testamentary capacity.

In the case of the infant the rules of the ecclesiastical lawyers prevailed for a much longer period. We have seen that the common law had fixed the age of majority for most purposes at

[1] P. and M. ii 427.

[2] See Swinburn 51b, 52.

[3] There was some doubt about this in Y.B. 4 Hy. VI. Trin. pl. 21 (p. 31) though the will was ultimately held to be good; cp. Y.B. 39 Hy. VI. Mich. pl. 38.

[4] Y.BB. 33 Hy. V. Mich. pl. 5; 12 Hy. VII. Trin. pl. 2 (p. 24); Tasker v. Tasker [1895] P. 1; Swinburn, Testaments 253b, 254. Bracton f. 60b had noted that permission to make a will was chiefly given "de rebus sibi datis et concessis ad ornamentum quæ sua propria dici poterunt, sicut de robis et jocalibus."

[5] Swinburn 52b, 53; Litt. §§ 191, 192.

[6] Y.B. 12 Hy. VII. Trin. pl. 2 (p. 24.)

[7] For the later law see Scammel v. Wilkinson (1802) 2 East 552, 558; In the goods of Cooper (1881) 6 P.D. 34.

twenty-one.[1] The ecclesiastical lawyers followed the Roman rule and fixed it at fourteen for boys and twelve for girls.[2] At these ages a boy or a girl could make a will, even when Blackstone wrote.[3] It was not till 1837 that the common law rule as to the age of majority was applied universally to testamentary capacity.[4]

Some Clauses found in the Wills of this Period

We have seen that the forms of the wills of this period are very varied. Their contents are no less varied. Generally, however, the average will contains the following clauses. First comes a pious preface reflecting upon the certainty of death and the uncertainty of its date.[5] Then come directions for the testator's funeral. Sometimes these are elaborate. The testator will prescribe exactly the processions and the ceremonies, and give elaborate instuctions for the building of his tomb.[6] Sometimes he goes to the opposite extreme, directing that as little as possible shall be spent on vain pomp, and leaving the money so saved to the poor.[7] That some part of the testator's estate should be devoted to religion or charity was regarded as essential. Besides the customary mortuary fee, which is usually expressly left,[8] extensive provision was made for religious services for the soul of the testator, and sometimes for the souls of his friends and relations. Persons could be hired to go upon a vicarious pilgrimage.[9] Masses were not expensive. One testator orders 7000 at a cost of one penny each—perhaps there was some reduction on taking a quantity.[10] The establishment of a chantry, and of a priest to sing in perpetuity, was not unusual. The Mortmain Acts had prohibited gifts of land to the religious houses.[11] That the piety or the apprehensions of the dying evaded the spirit of these Acts by the establishment of these

[1] Above 510.

[2] Swinburn 38b, 39; but seventeen seems to be the age at which a man could be executor, ibid 223; John of Ayton, Lyndwood 108; above 511.

[3] Bl. Comm. ii 497; Blackstone cites Perkins, Profitable Book § 503, as saying that a child of four may make a will; but this is clearly a misprint for fourteen; from this the conclusion was deduced that a direction by a testator under twenty-one to pay debts was valid and enforceable, though payment of the debts could not have been enforced against him by reason of infancy, Hampson v. Sydenham (1651) Nels. 55.

[4] 1 Victoria c. 26 § 7.

[5] These will be found on almost every page of any collection of wills.

[6] E.g. Wills and Inventories 41, 82; Test. Ebor. i 3, 4, 43; ii 262; Test. Vet. 51.

[7] Wills and Inventories 82; Test. Ebor. ii 204; Test. Vet. 54.

[8] E.g. Wills and Inventories 89, 100, the mortuary fee is left "ut moris est."

[9] Test. Ebor. ii 276, "Item volo quod unus homo conducatur ad peregrinandum usque Sanctum Ninianum in Scocia ad expensas meas et ibidem offerendum pro me unum annulum auri cum uno dyment in eodem;" i 257—a pilgrimage in pursuance of a vow made when nearly drowned on a voyage between Ireland and Norway; i 420—two marks to a person to go to Rome on pilgrimage.

[10] Test. Vet. 81; Furnivall 6, 4400 masses are to cost £18 10s.; cp. Y.B. 5 Ed. II. (S.S.) (1312) xxix-xxx.

[11] Above 87.

chantries no one who reads any collection of wills of this period can doubt.[1] Large quantities of land must have been burdened with rent charges in favour of the chantry priests. Henry VIII., when he prohibited such grants for a longer period than twenty years,[2] put a stop to an evil similar in kind to that which the Mortmain Acts had been designed to remedy. Sometimes testators are more sensible or less selfish. They give their money to the poor of their native village, or other place with which they had been connected. One merchant leaves money to the village where he had been accustomed to buy his wool.[3] Bequests for the building or repair of roads and bridges or churches are by no means uncommon.[4] Sometimes we meet with bequests to poor scholars at the University.[5] But perhaps the most striking characteristic of the mediæval will is the large number of specific legacies which it contains. The contents of a testator's living rooms, bedrooms, study, kitchen, and stable can often be pictured with very fair accuracy from the various legacies in his will. Often the articles are described with much minuteness. The bed with its hangings, the drinking cups, which sometimes have their special names and mottoes, the colour and value of the testator's clothes, the shape and make of his armour and weapons, are described with minute accuracy;[6] and sometimes little scraps of family history relating to the mode in which the articles were got are inserted. One testator leaves a gilt covered cup ornamented with crowns, which Edward III. had given to him;[7] another a cup which the Count of Arundell had given to him "under the condition that it always remain to my right heirs in memory of the aforesaid Counts;"[8] another "a litel Portose, the which the saide Sir Thomas [the testator] toke w^t^ hym alway when he rode."[9] Very frequently there is a legacy of a book or books. Of these, books of devotion are the most common;[10] but we often meet with books upon the civil and canon law,[11] sometimes books of general

[1] For a specimen see Furnivall 25.

[2] 23 Henry VIII. c. 10; cp. Sharpe, Calendar of Hustings Wills ii viii-x.

[3] Test. Ebor. ii 56, "Ad distribuendum inter yconomos de Yorkes Walde de quibus emi lanam xx*li*."

[4] Wills and Inventories 67, 73; Test. Ebor. i 8, 11, 18.

[5] Test. Ebor. ii 58, "Residuum ad exhibendum pro termino octo annorum in universitati Oxoniensi pauperes capellanos, qui, antequam ad exhibicionem per executores meos admittantur, sint in artibus baccalarii, ad gradum ulteriorem in eisdem in gressuri;" ibid i 416 there is a bequest for carrying on the war against the heretics in Bohemia.

[6] For a few illustrations see Test. Ebor. i 275, 279, 411; ii 98-104, 109, 133, 147, 226, 236, 259, 260—but almost every page of any collection will contain illustrations.

[7] Test. Ebor. i 255 (1399); cp. ii 61, "unum coller deauratum de corrodio Domini Regis."

[8] Ibid 275.

[9] Ibid ii 227.

[10] A most singular bequest is to be found in Wills and Inventories 65 (1420) of "i romance boke is called ye gospelles."

[11] See e.g. Wills and Inventories 101-103; the will of Master John Newton, treasurer of York Cathedral, Test. Ebor. i 364-371; and for the current prices of some of these books see some inventories ibid iii 74, 76, 132.

literary interest,[1] sometimes books of tales, or romance books,[2] and, what is most interesting to us as English lawyers, books upon English law. Bracton appears,[3] registers of writs, and books of the statutes;[4] and in one will a testator leaves to Guy Fairfax, the future judge, "unum Registrum magnum quod fuit Willelmi Gascoigne Justiciarii Angliæ"[5]—a legacy which all historians of the law will covet. It is this profusion of specific legacies, with the values attached to the articles bequeathed, either in the will or in the accompanying inventory, which makes these collections of wills so valuable to historians of many different sides of English life. Generally the will concludes with a residuary bequest either to the executors to be expended for the good of the testator's soul, or to the testator's wife, children, or other relatives.[6]

It follows from what has been said above, as to the forms of making a will, that the appointment of the executor or executors was the most important part of it.[7] There is usually a legacy left to the executors as a remuneration for their trouble.[8] Sometimes the legacy is made conditional upon their acceptance of the office.[9] Sometimes it is expressly said that they may charge for their trouble.[10] Occasionally the testator warns them against any collusion with his debtors or other fraudulent practices.[11] Sometimes he expressly says that they need give no account.[12] The powers conferred upon them were often wide. They were sometimes empowered to select the charitable objects on which the testator's money was to be spent for the salvation of his soul,[13] to settle any doubts arising upon the interpretation of the will;[14]

[1] Test. Ebor. i 209 (1396) "Pers plewman;" ii 14 (1431) Gower; 34 (1433) "Pers Plughman;" 61 (1437) "unum librum vocatum Francisci Petrarcæ laureati;" see Furnivall 136 n. for a mention of Chaucer's Canterbury Tales in a will of 1420.

[2] Test. Ebor. ii 29 (1433), "Librum Angliæ de Fabulis et Narracionibus."

[3] Ibid i 102 (1378)—a bequest to Merton College.

[4] Ibid ii 27 (1432)—a book of the statutes Ed. III.-Hy. IV., a Natura Brevium, and a book of the old statutes; ibid iii 23 (1403) John de Scarle, late lord chancellor, leaves his register with the statutes to the Chancery of Lancaster; iv 87—a Lyndwood; ibid 102 n.

[5] Ibid ii 233.

[6] In one case, ibid i 20 (1346), the testator states that he has given to his wife (one of his executors) and to his confessor verbal directions as to the mode in which his will is to be carried out.

[7] Above 537.

[8] See e.g. Wills and Inventories 48, 50, 51.

[9] Test. Ebor. i 355.

[10] Wills and Inventories 33, 60.

[11] Test. Ebor. i 234; ii 124, 245, "Prohibeo quod aliquis executorum meorum aliquid vendat de bonis meis ad vile precium propter aliquem favorem vel amorem alicujus personæ sed ad majus comodum."

[12] Ibid i 178—the wife being one of the executors and taking the residue to her own use.

[13] A common clause is the following: "Residuum lego A, B, C, D, etc., quos constituo executores, ut, Deum præ oculis habentes, disponant sicut animæ meæ viderint melius expedire."

[14] Test. Ebor. i 70, "Et si contingat quod aliquid de isto testamento alicui videatur ambiguum, obscurum, incertum, indistinctum, vel generale legatum, do executoribus meis predictis potestatem ambiguum interpretandi, obscurum declarandi, ncertum certificandi, indistinctum distinguendi, et generale legatum specificandi."

to act as guardian to the testator's children;[1] to make restitution to persons whom the testator had wronged in his lifetime.[2] We shall see that the latter bequest was in this period very necessary, for, when the wrongdoer died, his liability to be sued by those whom he had injured died with him.[3]

In fact, it was not merely formally that the appointment of the executor was the most important part of the will. It was to the existence of the executor that testators owed their large powers of effecting their wishes after their death. In fact, it was the existence of the executor which rendered legally possible some of the most important parts of the substance of the will. I have already noted the fact that in the devises of land permitted in the boroughs we can see the germs of many later equitable doctrines.[4] That this was so was due largely to the fact that in the executor of a will the law had a person who could be asked or commanded to do many various acts. The common law had deliberately declined to recognize any one holding a fiduciary position of this character. It declined in the case of land to look beyond the person seised; and the conditional feoffment was but a clumsy substitute for the supple use.[5] In the case of personalty it might have admitted such an idea through the executor, had not jurisdiction over matters testamentary been allowed to go to the ecclesiastical courts. The extent of the loss of the common law can be measured if we look at the clumsiness of the forms and the smallness of the results achieved by its ordinary conveyances, and compare with them the elasticity of the clauses and the variety of the effects achieved by the ordinary will. A very few instances will suffice. It is a common thing to find books or other valuable chattels settled in trust.[6] A power of appointment among children is given to a wife during her life, and after her death to the testator's executors.[7] Executors are given a power to give to friends and relations and to reward servants as they see fit.[8] A testator leaves a ship to his wife on trust (apparently) for his two daughters, with power to apply the profits to their children.[9] Property is left on condition that the beneficiary takes

[1] Wills and Inventories 61; Test. Ebor. ii 257.

[2] Test. Ebor. ii 130; see an elaborate provision to this effect in Hy. VII.'s will Test Vet. 27, 28.

[3] Below 576-583, 584.

[4] Above 274.

[5] Vol. ii 594 n. 5; Bk. iv Pt. I c. 2.

[6] Richmondshire Wills 3; Test. Ebor. i 369; iii 128, 217; cp. Y.B. 37 Hy. VI. Trin. pl. 11—bequest of a book to B, one of the executors, for life, and after his death to A for life, and after his death to a parish for ever; the court held the gift good, the executors being in substance trustees.

[7] Wills and Inventories 48, "Item do et lego residuum omnium bonorum meorum . . . ad maritandum seu ad matrimonia supportanda filiabus tam filiorum quam filiarum mearum secundum ordinacionem et disposicionem uxoris meæ in vita sua, et postmortem secundum disposicionem executorum meorum."

[8] Test. Ebor. i 55.

[9] Ibid i 85.

the name and arms of the testator.[1] "As tochyng Todworth," writes a testator in 1470, "and ye can thynke y^t this basterd of myne will thrife, latt hym have Todworth, or ellys latt him have xx marks, and go furth in the world, and this I put to your discrecyoune."[2]

Of the many human and humorous and intimate touches contained in these wills I can only give one or two examples. In these documents, generally drawn or dictated by the testators themselves, they are found in far greater profusion than in the conveyances of this period. A testator provides for the payment of his debts "de quo doleo valde;"[3] another more prudent or more fortunate can say, "blessyd be god y owe no thyng."[4] A little godchild is left, among other things, "a prymmer to serve god with."[5] Humphrey de Bohun, Earl of Hereford, leaves "a bason in which we are accustomed to wash our head."[6] William Haute, Esq., was a collector of relics. Among other choice fragments he leaves "one piece of that stone on which the archangel Gabriel descended when he saluted the Blessed Virgin Mary."[7] The canon of Yorke was assuredly no teetotaller who left to the late butler of an archbishop of Canterbury one shilling a week "pro potu cui solutus est," if this can be decently done.[8] We have an echo of the Wars of the Roses in the injunction of Margaret, Lady Hungerford, in 1476, to her heirs not to try to disturb any of the alienations of her property which she has been obliged to make owing to "seasons of trobill tyme late passe."[9] We are reminded of the litigious spirit of the times when a testator directs that £100 "be well, securely, and discreetly guarded in a certain secret place" to defend any pleas concerning the land that may happen to be brought against the heirs.[10] Family jars of a somewhat acute kind evidently inspired the declaration of a testator that he had not detained property which his daughter Katherine had often accused him of detaining.[11] Mr. Justice Vavisour's relations with his wife were not quite smooth. There had been a dispute about £7 which he asserted she had taken

[1] Test. Ebor. ii 269; Test. Vet. 108.
[2] Test. Ebor. iii 180.
[3] Wills and Inventories (1415) 58.
[4] Furnivall 42.
[5] Ibid 102 (1434).
[6] Test. Vet. 67 (1361).
[7] Ibid 300 (1462).
[8] Test. Ebor. iii 31 (1405), "Item volo quod Jacobus, quondam botillarius domini mei Willelmi de Wittillyseye, quondam archiepiscopi Cantuariensis . . . qui moram trahit apud Maydeston, in sua ultima necessitate habeat omni septimana xii*d.* pro potu cui solutus est, hoc anno usque festum Omnium Sanctorum, per rectorem de Bromle; et hoc vellem quod fieret ad finem vitæ suæ, si hoc fieri posset bono modo."
[9] Test. Vet. 320, 321.
[10] Test. Ebor. ii 213.
[11] Ibid iii 296 (1484), "Item, ubi dicta Katerina, filia mea, sæpius asseruit quod ego detinerem diversa bona per socerum meum, avum vero suum, eidem legata, protestor publice et expresse quod non habeo aliqua hujusmodi bona nec aliquis alius me sciente."

away; and her benefits under the will were made conditional upon her making restitution—a peculiarly effective way of having the last word.[1] A testator provides for the peace of his widow by making a bequest to his son dependent upon his diligence at his trade, his humility and good conduct—"nec arguendo uxorem meam nec aliquid in contrarium eidem vel executoribus meis infrascriptis inferre aut facere."[2]

These are but a few instances of the manner in which these wills bring us into closer touch with actual men and women than any other kind of legal, perhaps than any other kind of historical, document of this period.

§ 2. Restrictions on Testation and Intestate Succession

It is probable that in the days both of Glanvil and of Bracton a man who had a wife or children could not leave all his chattels by will unless the special custom of the town or other place where he dwelt allowed him to do so. His wife and children had certain rights to his property, of which he could not deprive them by his will.[3] If he left a wife alone she took a half; if a wife and children they took, the wife a third, and the children who had not received an advancement from their father in his lifetime[4] a third; and so definite was this right of the wife's that some thought that with her husband's consent she might bequeath it by her will.[5] It was only the half or the third which remained over that a man was free to dispose of as he pleased. So widespread was this custom that at a very early date the common law knew a special writ, called the writ *de rationabili parte bonorum*, by means of which the wife and children could get their shares. No doubt this writ was devised before the ecclesiastical jurisdiction over matters testamentary had been consolidated. It dates from a time when it was by no means clear that the king's court could

[1] Test. Ebor. iv 90.

[2] Ibid i 92 (1373); cp. Wills and Inventories 14, "Item Henrico le Vavasour filio meo sexaginta marcas sub hac forma, si bene se habuerit erga Deum et homines secundum judicium Executorum meorum, et maxime relinquendo illam meretricem quam nunc tenet."

[3] Glanvil vii 5; Bracton ff. 60b, 61; Magna Carta (1215) § 26, "Et residuum relinquatur executoribus ad faciendum testamentum defuncti; et si nihil nobis debeatur ab ipso, omnia catalla cedant defuncto, salvis uxori ipsius et pueris rationabilibus partibus suis;" P. and M. ii 347-348.

[4] The rule as to the advancement appears in the form of the writ *de rationabili parte* contained in the Register f. 142b; the idea is an old one; we see it in the rule as to the permission in Glanvil (above 74) to give away from one's heir a marriage portion to a daughter; Y.B. 1, 2 Ed. II. (S.S.) 41.

[5] Bracton f. 60b; P. and M. ii 426; there is at least one case in which she did so, Test. Ebor. i 21-23 (1346); and Lyndwood 173 sub voc. *Propriarum uxorum* is able to cite a little authority in favour of it.

not entertain an action for the payment of a legacy;[1] and its existence was sometimes found difficult to reconcile with the exclusive jurisdiction over matters testamentary which the ecclesiastical courts had assumed.[2] In later days, too, when this scheme of restraints on testation and intestate succession was decaying, there was much debate as to whether this writ lay by virtue of the common law or by virtue only of some special custom.[3] But, whatever may be true of the law of a later date, I cannot doubt that in the twelfth and thirteenth centuries this scheme of succession was the general rule, and that this writ was framed to secure its observance.

In thus holding that this scheme of succession was once part of the general law of England we are not obliged to rely only upon the evidence of Glanvil and Bracton. We have the evidence of the wills of this period, and the evidence of its survival over large and important parts of England. Moreover, though that part of the scheme which imposed restrictions on testation ceased to prevail generally in the course of the fourteenth century, we do not find during this period any other scheme of intestate succession put forward either in the Year Books or in the writings of the ecclesiastical lawyers. I shall here consider firstly, the evidence for the existence of this scheme; secondly, the reasons for its disappearance over the larger part of England; and thirdly, the growth of the new law which gradually took its place.

The Evidence for the Existence of the Older Scheme

In the wills of this period there are many references to this scheme of succession. In Furnivall's collection of fifty wills it is alluded to twice.[4] In the second of these cases the testator declares that if his wife and children ask for their reasonable parts according to law they are to be excluded from all benefits under his will. In the collections of wills from the northern parts of England it is still more frequently alluded to. I will give two instances out of many. In 1400,[5] Sir Robert Constable, of Flamborough, knight, "gave and bequeathed the residue of all his goods, after first deducting all debts due, to be divided into three parts, that is, one part to Margaret his wife, the second part to his sons not advanced, to be equally divided between them, the third part he has reserved to himself." In 1522[6] a testator's will contains

[1] Vol. i 627-628.

[2] P. and M. ii 350; Y.B. 1, 2 Ed. II. (S.S.) 40, *Stanton*, J., thought a claim for a child's part a matter for the eccelesiastical court, but changed his mind after argument.

[3] Below 553.

[4] 12 (1406); 20 (1411).

[5] Test. Ebor. i 265.

[6] Wills and Inventories 107.

the following clause: "I will that my Wyfe have hir thirde parte of all my goodes, my debts to be paied of the hole, my goodes equally to be devyded in thre, oon parte for my Wyfe such as p'teyneth to hir by the lawe, oon other parte to be devyded amongest my childer not promoted, the thirde parte thereof belonging to myselfe to goo for performance of this my last Will and Testament, and the residue thereof to be equally devyded emongst my said Children, and the expence of myne Executors to be paied of my partie."

That this scheme is so frequently alluded to[1] in these northern wills is explained by the fact that in the province of York the restraints upon testation imposed by this scheme of succession lasted till 1692.[2] It was not the case, indeed, here or in any other part of England, that the wife could leave her part by her will in the lifetime of the husband; for the common law rules as to the testamentary incapacity of the wife had become universal.[3] But both she and her children were entitled to their legitimate parts, of which a testator could not deprive them by his will, subject to the rule that the children who had been advanced must bring these advances into account.[4] These restrictions prevailed not only in the province of York, but also in Wales till 1696,[5] and in London till 1724.[6] Even then it was only the restrictions upon testation which these statutes of 1692, 1696, and 1724 abolished. As a scheme of intestate succession the old rules remained the law in these places till 1856.[7] Before 1856 the only change which took place in the law of intestate succession prevailing in those places was a change which affected, not the wife's part or the child's part, but the dead's part. The rules of succession to that part had come to be the same as the rules which governed the succession on intestacy to the whole of a man's movables in other parts of England.[8]

In other parts of England it is clear that these restrictions upon testation had disappeared early in the fourteenth century,

[1] The following are a few of the references: Richmondshire Wills 13; Wills and Inventories 57, 69, 75, 112; Test. Ebor. i 29, 97, 140, 251; ii 64; iv 9, 24; in Test. Ebor. i 357 a testator speaks of distribution among his wife and children, "prout secundum legem et consuetudinem regni Angliæ;" to the same effect a Bishop of Durham in 1313, Regist. Palat. Dunelm. i 369, 385, cited P. and M. ii 352; for other instances in towns, see cases cited by Gross, Mediæval Law of Intestacy, H.L.R. xviii 128, 129.

[2] 4, 5 William and Mary c. 2; 2, 3 Anne c. 5.

[3] Above 542-544.

[4] Swinburn Pt. iii §§ 16-18.

[5] 7, 8 William III. c. 38.

[6] 11 George I. c. 18. For a detailed account of these customs see Burn, Ecclesiastical Law (9th ed.) iv 564-603; for London see Calendar of Hustings Wills i xxxiii, xxxiv. Curiously enough, London is the example given by Bracton (f. 61) of a place where by special custom a man may leave by will all his property.

[7] 19, 20 Victoria c. 94.

[8] Stapleton v. Sherwood (1682) 2 Rep. Ch. 132; Burn, Eccl. Law iv 571, 572; 1 James II. c. 17 § 8.

except in so far as they were maintained in certain places by express local custom.[1] Though there are one or two cases in which the plaintiffs in an action brought upon the writ *de rationabili parte bonorum* allege that the writ lies by the general custom of the country;[2] though there was some authority for saying that the writ was given by Magna Carta;[3] it was safer to allege a special custom, and it gradually came to be thought that the writ lay only when some special custom could be shown.[4] Coke so states the law[5]—though down to Blackstone's day there was not wanting weighty authority to the contrary.[6] Thus this scheme of succession disappeared in so far as it imposed restrictions on testation; but there is no evidence that the rights of the wife and children on intestacy were disregarded. Though their rights were treated as customary rights to be proved to the court both by the common lawyers[7] and by the ecclesiastical lawyers,[8] there is no evidence of the prevalence of any other custom than that which gave half to a wife or a third each to wife and children.

I cannot but think that this fact, though not a conclusive

[1] Y.B. 1, 2 Ed. II. (S.S.) 39-42, detinue for a child's part against executors in which the count mentions the custom of the country; in a note to the MS. cited at p. 42 it said, "The opinion is that . . . the wife and children have no action if the husband has devised all his goods;" in Y.B. 7 Ed. II. 215 the writ de rationabili is said to be founded on Magna Carta; but in Y.B. 17 Ed. II. 536, where detinue for a reasonable part was said to be founded on the custom of the kingdom and Magna Carta, *Herle* says, "Nous avoms sovent vew tiel bref mez nous ne le veismes unques meyntenu," and he notes that a count according to the usage of the country might be good.

[2] Y.BB. 17 Ed. III. (R.S.) 144; 30 Ed. III. ff. 25, 26—the writ adjudged good; but it is said by *Skipwith*, and not contradicted, that the "will must first be performed, and if anything remains over then it may be she will have her portion."

[3] Y.BB. 6, 7 Ed. II. (S.S.) 30-31; 30 Ed. III. f. 26.

[4] Y.BB. 39 Ed. III. f. 6; 40 Ed. III. Mich. pl. 13—it is said that the lords in Parliament do not allow that this action is by custom or law of the realm; 23 Hy. VI. Mich. pl. 20; 7 Ed. IV. Mich. pl. 23.

[5] Co. Litt. 176b; Second Instit. 33.

[6] F.N.B. 122 L; in a little collection of conveyancing precedents known as Carta Feodi (Th. Berthelet 1543), at f. 36b it is said, "Si uxorem habeat bona in duas partes equales dividi debent. . . . Et si habeat uxorem et liberos in tres partes equales dividi debent bona . . . et tunc de parte sua condet testamentum;" and the universality of the custom at the end of the fifteenth century is attested by the Italian Relation of England (C.S.) 26-27; see also Johns v. Rowe (1628) Cro. Car. 106 *per* Croke, J.; Blackstone, Comm. ii 492-493 says, "Glanvil, Magna Carta, Fleta, the Year Books, Fitzherbert, and Finch, do all agree with Bracton, that this right to the *pars rationabilis* was by the common law: which also continues to this day to be the general law of our sister kingdom of Scotland;" Somner, Gavelkind (ed. 1726) 91-100, discusses the question; he says truly enough that the authorities are not clear, e.g. Bracton f. 60b speaks as if a man might make a will of all his movable goods, while later on in the same folio and f. 61 he speaks as if a man might only leave his portion in the absence of a custom to the contrary.

[7] Y.B. 1, 2 Ed. II. (S.S.) n. at p. 42, "After debts paid and testament executed, the wife and children take their shares by custom and not by the rigour of the law;" Y.B. 30 Ed. III. ff. 25, 26; Second Instit. 33.

[8] Lyndwood 163 sub voc. *Suis portionibus*, "Quoad has portiones in Anglia, quantum ad uxores, item quantum ad liberos, oportet recurrere ad jura Regia et Regni, et singularium locorum consuetudines;" cp. 178 sub voc. *Defunctum*.

proof, at least points to the once universal prevalence of the older scheme. That the two parts of the older scheme—the restriction on testation and the rules of intestate succession—hang together is clear from the survivals. As we have seen, the restrictions on testation lasted longest in those places where the old customary rules of intestate succession survived till the last century. The fact, therefore, that there is no evidence that any rules of intestate succession were known in this period other than these old customary rules would seem to raise a presumption that the other part of the older scheme—the restrictions upon testation—was once also universal.

I must now deal with the more difficult question of the reasons for the disappearance of the older scheme throughout the larger part of England.

The Reasons for the Disappearance of the Older Scheme

It is probable that it will not be possible to give a complete account of the reasons for the disappearance of the older scheme till we know something more of the proceedings of the ecclesiastical courts both of the northern and of the southern province;[1] for we must remember that there are really two things to be explained: firstly, the disappearance of this scheme over some parts of England, and secondly, its survival in others. Possibly the following considerations will supply a partial explanation.

In the first place, this branch of the law comes at the meeting-place of the lay and the ecclesiastical jurisdictions. The common law courts, when a question of succession to movables came before them, were apt to refer it as a matter testamentary to the practice of the ecclesiastical courts.[2] The ecclesiastical lawyers, finding no very general rules in the canon law upon these matters, were apt to refer to the common law and to the custom of the district.[3] Thus the way was opened for local divergencies, and for the growth of different practices in different jurisdictions. London had a large jurisdiction over matters testamentary which was exercised in the court of the Hustings. A considerable part of the northern province was under the palatine jurisdiction of the Bishop of Durham;[4] and no doubt the example which his ecclesiastical courts set would not be without its influence upon the ecclesiastical courts in the other part of the province. Wales also had its own peculiar system of courts.[5] The ecclesiastical courts of the southern province formed a separate system of courts; and, owing to the encroachments of the archbishop, jurisdiction over

[1] P. and M. ii 350.
[2] Y.B. 1, 2 Ed. II. (S.S.) at p. 40; above 553 n. 7.
[3] Above 553 n. 8. [4] Vol. i 109-114. [5] Ibid 117-132.

all the more important testamentary causes was being attracted to his prerogative court.[1] The fact that that court was closer to, and therefore more under the eye of the common law courts, was perhaps not without its influence upon its practice.[2]

In the second place, the position assigned by the common law to the married woman must have tended to disturb the older scheme.[3] To allow her to make a will of her part was clearly impossible. Lyndwood, indeed, tries to reconcile the rule of the common law as to her testamentary incapacity, with the rule of the ecclesiastical law as to her testamentary capacity, by distinguishing between a bequest of her part of her husband's property and a bequest of her own property.[4] Seeing, however, that the common law denied her the power to have any property at all, this distinction was hopelessly impossible. But when once the husband has been invested with the ownership of his wife's property, where can we draw the line? Are we to give him the ownership of the chattels and then take away a necessary incident of that ownership—the right of disposing of them by will? It is true that we might say that the husband is the owner, having the powers of an owner while he lives, but limited as to his testamentary powers; and in York, Wales, and London this solution was adopted. But the common lawyers very early seem to have come to the conclusion that, having made the husband the owner of the wife's goods, they could not limit his powers; and the influence of their views would probably be felt more strongly in the Archbishop of Canterbury's prerogative court than in any other place.

Somewhat the same reasoning will apply to the children's parts. Here again the influence of the common law was all in favour of the father. I have already pointed out that at this period the influence of the land law upon other branches of the common law was considerable.[5] The rights of heirs had ceased to fetter the free disposition of realty.[6] Why should the rights of children be allowed to fetter the father's rights as the owner of his personalty? This again was a case in which separate systems of courts might come to different conclusions. Moreover, in the case of children we are face to face with another difficulty. If the rights of the children are to be safeguarded, if the rules as to advancement are to be properly applied, a court is needed, sometimes to appoint, and always to supervise their guardians, to settle

[1] Vol. i 602.

[2] P. and M. ii 353, "At times during the fourteenth century the mere fact that the ecclesiastical courts were doing something was sufficient to convince royal justices and lay lords that something wrong was being done."

[3] Above 526-527, 542-543.

[4] At p. 173 sub voc. *Propriarum uxorum*, "Scias tamen quod uxor in bonis mariti absque ejus permissione potestatem non habet, sed ex ejus permissione sic."

[5] Vol. ii 590. [6] Above 75.

their shares, and generally to look after their interests. The city of London possessed such a court in the Court of Orphans.[1] Perhaps the ecclesiastical courts in the province of York and in Wales undertook similar duties. It would be interesting to know whether the Archbishop of Canterbury's prerogative court ever attempted to exercise an effective jurisdiction of this kind, or, if it had attempted to do so, whether the common law courts would have permitted it.

Thus the older restraints on testation vanished throughout the greater part of England. I must now deal with the development of the new rules which have taken the place of that part of the older scheme which dealt with intestate succession.

The Growth of the Modern Law

We have seen that it was the administrator appointed by the ordinary from among the relatives of the deceased who made distribution of the goods of a deceased intestate; and we shall see that these administrators were gradually assimilated in all respects to executors.[2] In theory no doubt the administrator should have distributed the estate according to the old customary rules. He should have given their shares to the wife and children, and have distributed the share of the deceased in pious uses.[3] The ordinaries tried to secure to the wife and children their rightful shares by the machinery of accounts, inventories, and bonds, and by their power of removal in cases of misconduct.[4] But it is probable that the courts of the southern province, which had been unable to maintain the old restrictions upon testation, had never at any time been very efficient supervisors of the conduct of the administrator. Perkins, whose "Profitable Booke" was published in 1530, thus speaks of the opportunities of the executor in his day:[5] "And it is to know, that if the executors will, that they may use such deceite that the legacies shall never be assigned, delivered or paid, notwithstanding that they have goods in their hands of the testator's of the value of one thousand pounds over and above the debts and legacies of the devisor, etc. For they may cause strangers to bring actions of debts against them as executors upon false obligations, etc. And so they may alwayes plead, when the devisees demand or sue them for their legacies in the

[1] Above 273 n. 2. [2] Vol. i. 627; below 567-569.

[3] The constitution of Archbishop Stratford enacts that, with respect to the goods of those who die intestate, the ordinaries, "Solutis debitis eorundem, bona quæ supererunt in pias causas, et personis decedentium consanguineis, servitoribus, et propinquis, seu aliis pro defunctorum animarum salute, distribuant et convertant, nihil inde sibi retento, nisi forsan aliquid rationabile pro ipsorum ordinariorum labore fuerit retinendum," Lyndwood 180.

[4] Below 591-593. [5] § 571.

spirituall court, that the debts of the testator are not paid, and that there are more suits against them than the goods of the testator are sufficient to satisfy or pay: and by such covene they may defraude the devisees of their legacies; and the executors may, or one of them may, by covene confesse the plaintiff's action, and execution may be sued against them by covene, etc. Or otherwise they may deny the obligations, by pleading that they were not the deeds of the devisor; and they may give such evidence, that it shall be found against them. And by such deceit and divers others covenous meanes, the devisees may be defrauded of their legacies, for such deceits may be so secretly done, that they shall not be intended covenous. And therefore it shall be well for such devisors to deliver such things, or cause them to be given or delivered unto them in their live times, and not to give them by way of legacy."[1] If such tricks were played by executors bound by the will to pay legacies of specific amounts, it is fairly clear that administrators bound to distribute the uncertain amount left after the payment of debts had still better opportunities.[2] One particular fraud—the device of getting a grant of administration to a man of straw, who at once handed over the assets as arranged—was met in 1601 by an enactment that persons thus getting the assets should, to the extent of the assets so got, be chargeable as executors de son tort.[3] By that time it had become quite clear that the ecclesiastical courts were powerless to prevent these frauds. Though these courts had continued to exercise their jurisdiction in Henry VIII.'s reign, in Edward VI.'s reign they almost collapsed.[4] In the case of the Duke of Suffolk the ecclesiastical lawyers, who followed Roman rules in reckoning degrees of kinship,[5] are reported to have concurred with the common lawyers, whose reasonings were based upon the law of inheritance, and to have laid it down that a mother was not of kin to her child for the purpose of taking out administration.[6] We could want no better illustration of the depths to which the ecclesiastical law had sunk. This particular decision was corrected.[7] But still more troublous times were in store for the

[1] Cp. Swinburn, Testaments 254b, 255, 277; below 583 and n. 2.

[2] Godolphin, Pt. II. c. 32. In Manningham's Diary (C.S.) 107 under the date Dec., 1602, there is the following tale: "One that was in execution for debt at the suit of a gent. that dwelt in a far country, procured one of his acquaintaunce to surmise that his creditor was deade, dyed intestate, and he next of kin, and thereupon to procure letters of administracion, by colour whereof he might have good opportunity to discharge the party, which was effected accordingly."

[3] 43 Elizabeth c. 8; for the executor de son tort see below 571-572.

[4] Vol. i 593.

[5] Lyndwood 180 sub voc. *Decedentium*.

[6] Swinburn 297-300; cp. Ratcliff's Case (1592) 3 Co. Rep. at pp. 39b, 40, where this case is mentioned; "what might be the reasons," says Swinburn, "whereby the civilians were moved to be of the same opinion, that the mother was not of kin to her child, I cannot easily conceive."

[7] Ibid 300b.

ecclesiastical courts. At the end of the sixteenth and the beginning of the seventeenth centuries the common law courts began to wage war on all rival jurisdictions. The ecclesiastical courts were hampered at every turn.[1] Writs of prohibition were issued against all who sued upon administration bonds;[2] and it was laid down in several cases at the beginning of the seventeenth century that the ordinary, having once committed the administration, was powerless. He could neither supervise the conduct of the administrator nor compel him to distribute.[3] Thus the law practically ceased to have any clear rules as to the persons entitled to succeed to movables upon the death of one who had died intestate. The person to whom the ordinary committed the administration was in practice the only successor recognized.[4]

The question whether the ordinary could take action on the administration bond, to compel the administrator to administer duly by distributing to the next of kin, was exhaustively argued both by the common lawyers and by the civilians in 1666 in the case of *Hughes v. Hughes*.[5] In that case administration had been granted to the son of Dr. Hughes. Dr. Hughes's daughter, the sister of the administrator, cited her brother before the ecclesiastical court to compel him to make distribution. He got a writ of prohibition, and the question in the case was whether a writ of consultation[6] should issue. It was pointed out, truly enough, that writs of prohibition to prevent the ordinary from taking such action upon the administration bond were unknown for fifty years after the statute of Henry VIII. which regulated the granting of administration.[7] The hardship of not allowing the writ of consulta-

[1] Vol. i 629.

[2] Tooker v. Loane (1616) Hob. 191; cp. Hughes v. Hughes (1666) Carter's Rep. 125.

[3] Slawney's Case (1616) Moor 864, Hobart 83; Fotherbie's Case (1627) Cro. Car. 62; Levanne's Case (1631) ibid 201.

[4] In the case of Carter v. Crawley (1683), T. Raym., at p. 500, a case which contains a very good historical account of this subject, it is said, "Before this statute (of Distribution) the administrator that had all the burden of the administration had likewise the benefit, and when he had paid all the debts and legacies was never more questioned upon his account, because no man could demand the overplus from him;" cp. Palmer v. Allicock (1684) 3 Mod. 58, 60, "The administration being once committed, the person to whom it was granted had the whole estate, and the rest of the relations of the deceased were undone, and, therefore, if his children were under age or beyond the seas, and a stranger had got administration, it would have been a bar to them."

[5] Carter's Rep. 125.

[6] See vol. i 229, and App. XIB for this writ.

[7] Dr. Walker, who argued for the defendant, said at pp. 134, 135, "Presently after this statute it was considered, and by best advice this bond was conceived and framed . . . and this hath continued ever since. This bond hath been put in execution a thousand times per annum. . . . For about fifty years after 21 Hy. VIII. no prohibition was ever granted. Sure the judges understood the statute well in fifty years' time. The case was obvious every day. Thousands of administrators called to account, and a thousand distributions made."

tion to issue was obvious. It might mean that the daughter of a wealthy man would be reduced to beg her bread; and other cases quite as hard and quite as absurd were possible. "A dies indebted, and he hath others indebted to him, and these lookt upon as desperate, whereupon wife and children dare not take it (administration). The creditor ventures; and then the debts come in and he pays himself and all the rest, and there is a thousand pounds surplusage. Shall the creditor have it? Sure after account given to the ordinary the surplusage shall be distributed to his wife and children." [1]

The report does not tell us what was the result of the case; but to it the reporter appends the note—"et puis per Act del Parliament pur melieux settlement des intestates estates fuit contrived." In fact there can be little doubt but that the discussion which the subject received in this case was the direct cause for the settlement of the law on its modern basis by the Statute of Distribution of 1670. The hardships of the existing law, though they failed to persuade the other judges, had persuaded Bridgman, the Chief Justice of the Common Pleas, that the ecclesiastical courts ought to have the power to compel distribution.[2] The king himself had intervened in this case, and in 1667 had written to Bridgman, who had just been made Lord Keeper and was still Chief Justice, requiring him to get the matter settled by the judges of the Common Pleas and the Privy Council, that his subjects might not be put "to the expense and trouble of trying jurisdictions instead of getting their just rights." [3] And so we may conclude that it was in consequence of the stir made by this case that an Administrators' Bill, drawn by Dr. Walker, who had argued for the daughter of Dr. Hughes,[4] was introduced into the House of Lords on March 4, 1668.[5] This bill was in effect the first draft of the Act which two years later became the Statute of Distribution. The bill, as originally drafted, gave powers to the ecclesiastical courts to take bonds, and otherwise to compel administrators to distribute;[6] but, on its third reading, the Lords directed

[1] Carter's Rep. at p. 136.

[2] "This Act (the Statute of Distribution) was penned by Sir Walter Walker in the time of my Lord Chief Justice Bridgman, when he was Chief Justice of the Common Pleas. He had liberty to argue then for the power of the Spiritual Court in granting distributions; and after he had argued for three hours, Bridgman, Chief Justice, inclined in opinion to Sir Walter Walker, but the other judges opposed it; and it never obtained in Westminster Hall, but prohibitions were granted upon the first motion. And when he could not obtain his point in the Courts of Law, he procured an Act of Parliament," *per* Holt, C.J., 1 Ld. Raym. at p. 474; Dr. Walker's argument will be found in Carter's Rep. at pp. 130-136.

[3] S.P. Dom. 1667, 520, ccxix 132. [4] Above 558 n. 7.

[5] Hist. MSS. Com. Eighth Rep. App. Pt. I. 118 no. 145.

[6] Ibid.

that it should be supplemented by a clause to secure an equality of distribution of intestates' estates. This clause was drafted by Kelyng, the Chief Justice of the King's Bench, assisted by the other judges,[1] and is substantially the same as clause 3 of the Act of 1670.[2] The bill, thus amended, passed the Lords, but was dropped in the Commons.[3] Two years later a new and improved bill was introduced. The clauses of the old bill were retained; but to them was added § 5 of the Act which lays down in detail the rules as to the distribution of intestates' estates, and § 2 which contains the form of the administrator's bond.[4] The last two sections of the Act, which contain provisos as to grants of administration cum testamento annexo, and as to the continuance of the Act, were added by the House of Commons.[5]

The Act[6] thus grew out of a bill which was designed to strengthen the jurisdiction of the ecclesiastical courts to call administrators to account, and to compel them to distribute.[7] This fact is obvious from the scheme of the Act; for it is clear that the clauses which define the persons who are entitled to take on intestacy were added later, and worked into the structure of the original Bill.[8] "The whole scope of the Act," it was said in *Carter v. Crawley*,[9] "was to make their jurisdiction (i.e. the jurisdiction of the ecclesiastical courts) legal which before was condemned by the king's courts." Thus it may be said that the Act, as passed, had two main objects: firstly, to strengthen the jurisdiction of the ecclesiastical courts over the administration of the estates of intestates, and secondly, to define the rights of persons entitled to take on intestacy. Let us glance briefly at the effect of the Act on these two branches of the law.

(i) The Act failed to effect the first of the objects which it set out to secure. In 1678 North, C.J., proposed, without success, to amend the Act by giving to these courts further powers to call administrators to account.[10] The common law courts still continued to regard the ecclesiastical courts with jealousy;[11] and we have seen that the jurisdiction assumed by

[1] Hist. MSS. Com. Eighth Rep. App. Pt. I. 118 no. 145.
[2] Hist. MSS. Com. Ninth Rep. App. Pt. II. 3 no. 18.
[3] Eighth Rep. App. Pt. I. 118 no. 145, 122 no. 167.
[4] Ninth Rep. App. Pt. II. 3 no. 18.
[5] Ibid.
[6] 22, 23 Charles II. c. 10.
[7] §§ 1-3.
[8] §§ 5-8.
[9] (1683) T. Raym. at p. 504.
[10] Hist. MSS. Com. Ninth Rep. App. Pt. II. 115 no. 573—probably his proposed amendments failed to pass the House of Commons.
[11] See e.g. Clarke v. Clarke (1701) 1 Ld. Raym. 585, where the King's Bench prohibited the ecclesiastical court from compelling a debtor to the estate to pay what he owed into court that it might be distributed, because this would amount to allowing the ecclesiastical court "to hold plea of debt."

the court of Chancery over all questions relating to the administration of assets, and the manner in which that court ignored the ecclesiastical courts, deprived those courts of all effective jurisdiction.[1]

(ii) On the other hand, the clauses of the Act which define the rights of the persons entitled to take on intestacy have made our modern law. These clauses were added to by a clause of the Statute of Frauds which made it clear that, in spite of the Statute of Distribution, the husband's right to take administration to his wife was still a beneficial right;[2] and by a clause in a statute of 1685 which gave to the brothers and sisters of an intestate the right to share equally with the intestate's mother.[3] With these two additions these clauses of the Act contained till 1890 the whole of the law on this topic; and the modification in favour of the widow made by the Intestate's Estates Act of that year is slight.[4]

The results of this legislation up to 1865 may be stated thus: (*a*) the husband by taking out administration has the right to succeed to such of his wife's property as had not already vested in him *jure mariti*—i.e. to choses in action belonging to his wife not reduced into possession during the marriage.[5] (*b*) The wife has a right to a third of her husband's property if there are children of the marriage or representatives of children surviving, and a half if there are not.[6] (*c*) Two-thirds of the property in case there is a widow, the whole in case there is not, goes to the children.[7] If there are no children half the property in case there is a widow, and the whole in case there is not goes to the next of kin;[8] and if there are no next of kin to the crown.[9] (*d*) Generally degrees of kindred are computed by reckoning up from the intestate to the common ancestor, and from the common ancestor to the claimant, and counting each step a degree.[10] But certain exceptions to this rule were introduced by the Acts or by the construction put

[1] Vol. i 629; cp. Bk. iv Pt. I. cc. 4 and 8.

[2] 29 Charles II. c. 3 § 25; that this was the law before the Statute is clear from Ognel's Case (1597) 4 Co. Rep. at f. 51b, and the majority of the court in Johns v. Rowe (1628) Cro. Car. 106.

[3] 1 James II. c. 17 § 7; "the statute of 1 Jac. 2 allowed the proceedings of the spiritual court to be right, as the law then stood, but thought it unreasonable that the mother (who might marry again) should carry all away; and therefore the parliament let in the intestate's brothers and sisters equally with the mother," Blackborough v. Davis (1701) 1 P. Wms. at p. 49 *per* Holt, C.J.

[4] 53, 54 Victoria c. 29.

[5] Above 527.

[6] 22, 23 Charles II. c. 10 §§ 5, 6.

[7] Ibid.

[8] Ibid.

[9] Hensloe's Case (1600) 9 Co. Rep. 38b—the Crown's right is a common law right not dependent on the statute.

[10] Carter v. Crawley (1683) T. Raym. at p. 506; Mentney v. Petty (1722) Prec. Ch. 593.

upon them. Thus—the issue of deceased children represent their ancestor;[1] if any of the brothers or sisters of the deceased survive, the children of a deceased brother or sister represent their parents;[2] the father of an intestate excludes the mother,[3] and the mother shares with the brothers and sisters of the deceased and with the children of deceased brothers and sisters;[4] grandparents are postponed to brothers and sisters of the deceased.[5] (*e*) After considerable debate it was decided by the House of Lords in 1690, on the construction of the Statute of 1670, that collaterals of the half blood rank equally with collaterals of the whole blood in the same degree.[6] (*f*) If any child other than the heir at law has received an advancement from his or her father in land, or if any child including the heir at law has received an advancement from his or her father in money, and the father has died completely intestate, such child must bring the amount of the advancement into hotch-pot if he wishes to share with his brothers and sisters.[7] This is a rule founded on the custom of London[8] which is designed to secure the main purpose of the Act—equality of distribution.[9] These rules were ascertained by decisions upon the construction of these Acts of the end of the seventeenth and the beginning of the eighteenth centuries. As the result of this legislation and these decisions the common law obtained a reasonable system of intestate succession—though, as we have seen, it was not till 1856 that this system became universal.[10]

In this system of intestate succession the marks of the three different periods through which this branch of the law has passed

[1] 22, 23 Charles II. c. 10 §§ 3, 5; Carter v. Crawley (1683) T. Raym. at p. 500.

[2] 22, 23 Charles II. c. 10 § 7; Carter v. Crawley at p. 506; Walsh v. Walsh (1695) Prec. Ch. 54; Pett's Case (1700) 1 P. Wms. 25.

[3] Blackborough v. Davies (1701) 1 P. Wms. at pp. 48, 49 *per* Holt, C.J.

[4] Ibid; 1 James II. c. 17 § 7.

[5] Evelyn v. Evelyn (1754) 3 Atk. 763, following a case decided in 1708.

[6] Watt v. Crook, Hist. MSS. Com. Thirteenth Rep. App. Pt. V. 8-9 no. 239—Holt, C.J., said, "I am of opinion that the half blood ought to have the same share. I confess it is hard, but we are bound by the Statute . . . the law has been constantly held so, and though it is hard, yet the words of the Act bind us up;" S.C. Shower, P.C. 108, where the precedents are all cited.

[7] 22, 23 Charles II. c. 10 § 5; Vachell v. Jeffreys (1701) Prec. Ch. 170; Holt v. Frederick (1726) 2 P. Wms. 356; Edwards v. Freeman (1727) ibid at pp. 440, 441; the rule applies to the issue of a deceased child claiming the parent's share by representation, Proud v. Turner (1729) 2 P. Wms. 560; it was held in Fouke v. Lewen (1682) 1 Vern. 88 that "any provision made by the father in his lifetime for his children is an advancement within the custom (of London);" the most recent case on this subject has emphasized the view that the property or money must be given as a provision of a permanent kind, Re Scott [1902] 1 Ch. at p. 17 *per* Cozens Hardy, L.J.

[8] Holt v. Frederick (1728) 2 P. Wms. at p. 358 *per* King, L.C.

[9] Edwards v. Freeman (1727) 2 P. Wms. at p. 443 *per* Raymond, C.J.

[10] Above 552.

are plainly visible. The rights of the wife and children and the rules as to advancement remind us of the earliest period when the old customary rules prevailed. The rights of the husband remind us of the intermediate period, when the person who got administration was the intestate successor. The rights of the next of kin depend upon the statutes, and the cases interpreting these statutes, which compel administrators to distribute in the manner which they prescribe.

§ 3. The Representation of the Deceased

At the present day the normal representatives of the deceased are either executors or administrators. The law also recognizes an abnormal representative in the shape of the executor de son tort. In this section I shall deal, firstly, with the origins of these various representatives; secondly, with the mode in which and the extent to which they became the representatives of the deceased during this period; and thirdly, with their position at common law and in the ecclesiastical courts.

Origins

In modern law there is little practical difference between the position of the executor and that of the administrator. There are a few differences between them on some minor points, for instance as to the transmissibility of their office, or as to the time when the estate of the deceased vests in them; but in all essential points their position as the representatives of the deceased is identical. This identity is not primæval. It is the executor who is the model to which the administrator has been gradually assimilated. I shall therefore deal firstly with the executor, and secondly with the administrator. Lastly I shall say a few words about the executor de son tort.

(i) *The executor.*

In the fifteenth and sixteenth centuries it will have become possible to compare the English executor with the Roman *hæres;*[1] but it is not to the *hæres* of Roman law that we must look for the origins of the executor. We must probably look to the Germanic *Salman.*[2] Though we see no distinct traces of such a person in the Anglo-Saxon period, he appears in Glanvil;[3] and there can be

[1] Lyndwood 172 sub voc. *Intestatis*, "Executores universales, qui loco hæredis sunt;" Doctor and Student i c. 19, "The heir which in the laws of England is called an executor."

[2] P. and M. ii 333, 334; L.Q.R. i 164; Goffin, The Testamentary Executor 35-37.

[3] vii 5; above 536.

little doubt but that this person, familiar in the continental codes of law and in the canon law,[1] was introduced into England after the Conquest.

We shall see that the Salman was a person to whom property was transferred in order that he might convey it according to the grantor's directions.[2] A transfer to a Salman was employed to effect various objects;[3] but it was especially useful to persons who wished to make a revocable will. We have seen that the older forms of gifts mortis causa were rather conveyances or deathbed distributions than revocable wills.[4] By means of the Salman a man could make a revocable will, because such a person was always obliged to consent to a revocation by the donor of the authority with which he had been invested.[5] Moreover, it became possible to do many other things in a will besides merely leaving property, because the testator now had a person who was bound to comply with his wishes.[6] We have seen that the canon law was in favour of the utmost liberty of testation.[7] It did not neglect so useful an agent as the Salman; and just as the forms of making a will became simplified, so did the forms of appointing a Salman. "At first," says Mr. Goffin, "the *salmann* or 'testamentary executor,' as we may now call him, was appointed in the old way—a bilateral act in which both the testator and the executor took part was necessary. It became the general practice at a later time, however, to appoint the executor in a clause of the will itself, possibly without his own knowledge till the will was opened after the testator's death."[8] These simplified forms were already in use when the executor makes his appearance in this country. Thus the Salman, when used for the purpose of effecting a last will, becomes the "executor" of the will—the man who puts it into force and sees that it is carried out. The canon law knew many "executors" of different kinds of legal acts.[9] English law has borrowed one of those executors—the testamentary executor; and, in the language of English law, the executor has come to mean a person appointed by a testator to execute his will.

[1] Goffin chap. ii; cp. Brissaud 1585-1587.

[2] Bk. iv Pt. I. c. 2; cp. Brissaud 1444, 1445.

[3] Goffin 25, 26, 27.

[4] Vol. ii 95-96.

[5] Brissaud, 1444-1445, "Il en est question tout d'abord à propos de transmissions *mortis causa;* exposé à un danger de mort, je veux gratifier quelqu'un après mon décès; mais si je survis, j'entends conserver mes biens; pour atteindre ce but, je les confie à un tiers, à celui qu'on appellera un *Salmann* à l'époque féodale, en lui faisant promettre d'exécuter mes volontés; par là je serai plus assuré de les recouvrer en cas de survie;" Goffin 26, 28—it would appear that the revocation of the authority was not a unilateral act of the conveyor, though the Salman could not object to it.

[6] Above 548; cp. Goffin 29.

[7] Above 535.

[8] The Testamentary Executor 32.

[9] Lyndwood 168 sub voc. *Executor*, "Breviter scias, quod in jure reperiuntur executores sententiarum, negotiorum, præceptorum, testamentorum, et gratiarum."

The complete separation in this country between the law of inheritance to realty and the law of succession to personalty gave the executor a far more important place in England than he took on the continent. On the continent his claims to act as the representative of the deceased were disputed, and often successfully disputed, by the heir.[1] In England he gradually became the chief testamentary representative of the deceased, and will no doubt become in time his only representative.[2] Even in the fifteenth century, as we have seen, he has begun to look like the Roman hæres; and learned canonists are saying that a will which does not appoint an executor is no true testament. We have seen that the latter theory was a piece of borrowed Romanism which never had much influence upon English law.[3] Both in the actual rules of law and in the history of the idea of the representation of a deceased person, characteristics which are derived from the office of the ancient Salman are at once more permanent and more important. Thus, the office of Salman was hereditary and devolved on the Salman's heir.[4] The office of executor is transmissible to the executor of an executor.[5] Again, from the first, the beneficiaries under the will could enforce their rights against the Salman.[6] These rights might be not only the rights of legatees, but also of creditors if the testator had directed in his will that his debts should be paid. This was the position which the executor occupied in the thirteenth century.[7] It is most probable, therefore, that it was through the Salman that the law became familiarized with an executor who could act as the representative of a deceased person; and we shall see directly that it was the executor which the legislature took as its model when it wished to give the administrator this position.[8]

Testators usually appointed more than one executor in their wills. Sometimes they appointed special executors for special purposes.[9] Often they appointed certain persons executors, and

[1] Goffin chaps. iv and v; cp. Brissaud 1587, 1588, "Une fois qu'on se fut habitué à faire passer l'ensemble du patrimonie à des légataires par l'intermédiare des exécuteurs, l'institution d'héritier au sens romain rentra dans les habitudes. De ce moment date le déclin de l'exécution testamentaire. . . . L'exécution tomba en desuetude dans les pays de droit écrit; elle se maintint dans les pays des coutumes . . . mais le rôle des exécuteurs se borna au payement des legs."

[2] The Land Transfer Act of 1897 makes a long step forward in this direction.

[3] Above 537.

[4] Goffin 30.

[5] Y.BB. 34 Hy. VI. Mich. pl. 26 *per* Choke; 10 Ed. IV. Pasch. pl. 1 *per* Catesby. But a statute was needed to put such executors of executors in the same position as their testators, 25 Edward III. st. 5 c. 5; we shall see that it was only gradually that the executor became a representative for all purposes, and that developments in this direction were strictly construed, below 572 seqq.

[6] Goffin 26, 27.

[7] Below 573.

[8] 31 Edward III. st. 1 c. 11; below 568-569.

[9] Test. Ebor. i 407 (1424)—a separate executor for goods at Cambridge; cp. Y.B. 8 Ed. IV. Pasch. pl. 12.

others, often more distinguished men, supervisors or coadjutors[1] —we are reminded sometimes of the more primitive period when presents were given to the king or other lord that the will might stand.[2] It was held in 1346 that if these supervisors took part in the administration of the estate they could be charged as executors; but that they need not be named in a writ brought against executors, as the testator had only appointed them as assistants.[3] This view of the law was followed in 1443, provided that the testator had given them power to administer his goods, since any words showing that a testator intended that a person should administer were sufficient to make that person executor.[4] On the other hand, it was decided that the appointment of a person merely as supervisor of certain named executors with no power to administer could not take effect if those executors declined to act.[5] On the death of any of the joint executors, the office survived to the others;[6] and, as we have seen, on the death of the last surviving executor it went to his executor if he left a will appointing an executor.[7]

Since the executor was appointed by the deceased, the property of the deceased vested in him from the death.[8] But he could not prove his title till he had got probate of the will;[9] and therefore without such probate he could not sue in any court.[10]

(ii) *The Administrator.*

Swinburn,[11] writing in 1590, tells us that there are three kinds of executors. There is the executor testamentary with whom we have just dealt; there is the executor legitimus, "which deriveth his authoritie from the law," who is the bishop or ordinary of every diocese; and there is the executor dativus, "which deriveth his authoritie from the bishop or ordinarie," who is the person usually known as the administrator. Such an administrator is appointed either if a man die intestate, or if he die testate without having appointed executors. Being merely the delegate of the ordinary he cannot delegate his powers;[12] and, therefore, if he die, his executor will not be the representative of the person whose goods

[1] Test. Ebor. i 234, 235 (will of John of Gaunt) the king is made "de cest mon testament souverein surveoir et commandour;" cp. Test. Vet. 375, 534, 593.

[2] Vol. ii 93-94, 96.

[3] Y.B. 20 Ed. III. (R.S.) ii 430.

[4] Y.B. 21 Hy. VI. Mich. pl. 16 *per* Newton, Fulthorpe, and Ascue, *dissentiente* Paston.

[5] Ibid at p. 6 *per* Newton.

[6] Y.BB. 33-35 Ed. I. (R.S.) 546; 39 Hy. VI. Hil. pl. 9.

[7] Above 565.

[8] Y.B. 10 Ed. IV. Pasch. pl. 1 *Littleton* says, "Il convient que le propertie soit en ascun person, et il ne puit estre en le testator car il n'est en esse, ergo il est en executor;" cp. Y.B. 35 Hy. VI. Mich. pl. 39.

[9] Y.B. 7 Hy. IV. Trin. pl. 19.

[10] Y.B. 21 Hy. VI. Hil. pl. 4 (p. 24) *per* Paston.

[11] Testaments Pt. vi § 1.

[12] Cp. Y.BB. 18 Hy. VI. Mich. pl. 7; 10 Ed. IV. Pasch. pl. 1 *per* Choke.

he was administering. The ordinary must make a new grant of administration.[1] In the fourteenth century it seems to have been admitted that if a sole executor was mentally defective the ordinary could grant administration to the executor and another;[2] and in the sixteenth century various cases were recognized in which it was possible to appoint an administrator for a limited period, e.g. durante minore ætate; or in special circumstances, e.g. where one makes another his executor a year after his death, or an executor becomes insane.[3] But the jealousy which existed between the ecclesiastical and the common law courts all through their history, and especially in the seventeenth century, retarded the settlement of the law as to these limited grants of administration. Thus it was held in 1691 that no grant of administration pendente lite could be made when there was a dispute as to the existence of a will which appointed executors, because the existence of an executor took away the jurisdiction to make such a grant;[4] and in 1701 that the fact that an executor "was an absconding person incapax, etc.," was no justification for refusing him probate.[5] However, in the course of the eighteenth century, when, largely in consequence of the Statutes of Distribution,[6] the jealousy of the exercise of this branch of the ecclesiastical jurisdiction had abated, these limited grants were allowed.[7] But we shall see that one of the consequences of the idea that no administration could be granted if an executor had been appointed, which was an effect of the old jealousy between the common law and the ecclesiastical courts, was not got rid of till the present century.[8]

Swinburn's words as to the executor legitimus and the executor dativus really represent two different stages in the history of the representation of one who has died without having appointed an executor; and both these stages have left their traces in our law. The first stage is the period before the statute of 1357,[9] and the second stage is the period after that statute.

In the earliest period it was the ordinary who took possession of and administered the goods of a deceased person who had died intestate or without having appointed an executor;[10] and to the

[1] Below 569.

[2] "The Ordinary desired him to administer, and made an order to that effect, because he distrusted the ability of her that was named executrix. Since, then, he has had the administration, why should not his acquittance be good," the Eyre of Kent (S.S.) ii 40 *per* Bereford, C.J.

[3] Graysbrook v. Fox (1565) Plowden at pp. 281-282; Piggot's Case (1598) 5 Co. Rep. 29a; Prince's Case (1600) ibid 29b; Hills v. Mills (1692) 1 Salk. 36.

[4] Frederick v. Hook Carth. 153.

[5] R. v. Raynes 1 Salk. 299.

[6] See Hewson v. Shelley [1914] 2 Ch. at p. 39 per Phillimore, L.J.

[7] See e.g. Walker v. Woolaston (1731) 2 P. Wms. 576, which in effect overrules Frederick v. Hook Carth. 153.

[8] Below 569-571.

[9] 31 Edward III. st. 1 c. 11.

[10] Vol. i 627.

end the property in the goods of one who had so died vested upon his death in the ordinary.[1] But though the ordinary took the goods, he was in no sense a true representative. He was not liable to be sued nor was he able to sue. A statute of 1285 made the ordinary liable to be sued as if he had been an executor;[2] but no statute enabled the ordinary to sue.[3] In order to carry out his duties the ordinary, though not legally bound to do so, was in the habit of appointing some person or persons to administer the property of the deceased. But these persons were simply the delegates of the ordinary, and stood in the same position with regard to liability to be sued and capacity to sue as their principal.[4] They could be sued "by the equity of" the statute of 1285; and when sued they were always sued as executors. "Let me tell you," said Bereford, C.J., in 1313-1314, "that if you want to bind a man to answer for another's debts you must bind him as executor, and not as administrator. Unless you say that he is executor you will not be answered. . . . It is the fact of having administered that binds him to answer; but it is necessary, if you are to force him to answer, that he have these two qualifications, that he be an executor, and that he has subsequently administered."[5] But they could not sue. "It is unheard of," said Stonore, C.J., in 1345,[6] "that those to whom administration has been entrusted by the ordinary have any action, except in respect of the goods of which they have been seised and from which they have been ousted." We are not surprised to find that in 1343 the commons petitioned that these delegates of the ordinary should be allowed to sue.[7] The petition was refused; and it was not till 1357 that a remedy was provided.

The statute of 1357 really originated the administrator.[8] It marks the point when the affairs of the man who had appointed

[1] Now in the ordinary's successor, the President of the Probate, Divorce, and Admiralty Division of the High Court, see 21, 22 Victoria c. 95 § 10.

[2] 13 Edward I. st. 1 c. 19, "Whereas after the death of a person dying intestate, which is bounden to some other for debt, the goods come to the ordinary to be disposed; the ordinary from henceforth shall be bound to answer the debts so far forth as the goods of the dead will extend, in such sort as the executors of the same party should have been bounden, if he had made a testament;" see below 573-574 for an explanation of this.

[3] Y.B. 18 Hy. VI. Mich. pl. 7, "Al Common Ley ne fuit aucun action done pur l'ordinary ne encontre luy, mes or par le Statut action est don encontre luy, mes le Statut ne done action pur luy," *per* Fortescue, C.J.; cp. Graysbrook v. Fox (1565) Plowden at pp. 277, 278.

[4] Y.B. 45 Ed. III. Trin. pl. 4; Regist. Palat. Dunelm. i 369, cited P. and M. ii 359, 360; Plowden 278 n. *e*; and it would seem that if the ordinary had not administered himself, but had appointed administrators, he could not be sued, but they only, Y.B. 12 Rich. II. 91-95.

[5] The Eyre of Kent (S.S.) ii 56; cp. Y.BB. 38 Ed. III. Mich. p. 21; 41 Ed. III. Hil. pl. 6 *per* Belknap; 10 Ed. IV. Pasch. pl. 1 *per* Choke.

[6] Y.B. 18, 19 Ed. III. (R.S.) 534, 536; cp. Y.B. 19 Ed. III. (R.S.) 12; Plowden 278.

[7] R.P. ii 142.

[8] 31 Edward III. st. 1 c. 11; cp. Plowden 278.

no executor were taken from the hands of the ordinary, or "executor legitimus," and entrusted to the administrator, or "executor dativus." It compelled the ordinary to appoint, "from the next and most lawful friends of the deceased person intestate," some person or persons to administer the property of the deceased; and it was expressly enacted that the persons so appointed should "have an action to demand *as executors* the debts due to the said person intestate in the king's court, for to administer and to dispend for the soul of the dead; and shall answer also in the king's court to other to whom the said dead person was holden and bound, in the same manner as executors shall answer; and they shall be accountable to the ordinaries, as executors be in the case of testament." Henceforward administrators appointed under this statute and the later statute of Henry VIII.[1] are, like executors, the representatives of the deceased. We shall see that these changes are intimately connected with the changes in the position of the executor which made him the representative of the deceased.[2]

But the older ideas which regarded the administrator as simply the delegate of the ordinary have left their traces in the law. The ordinary could appoint either one or several administrators; and, in the latter case, the office survived to the other or others on the death of one. But when the last surviving administrator died the office did not go to his executor. A new appointment must be made.[3] Seeing that the administrator was the delegate of the ordinary, the ordinary had powers of revoking the letters of administration and of making a new appointment, which he did not possess in the case of the executor.[4] The property of the deceased vested in the administrator from the time of the grant of the letters of administration;[5] but it was recognized that his title would be considered to relate back to the death for the purpose of enabling him to sue in respect of matters happening between the date of the death and the grant of administration.[6] Another result, which must be attributed partly to the idea that the administrator is simply the delegate of the ordinary, and partly to the jealousy which existed between the common law and the ecclesiastical courts, was the rule that if a will appointing an executor was in existence, a grant of administration was void ab initio, and, consequently, that all transfers of property and other acts done thereunder were void. The earliest authority on this

[1] 21 Henry VIII. c. 5. [2] Below 574.
[3] Y.BB. 34 Hy. VI. Mich. pl. 26; 10 Ed. IV. Pasch. pl. 1.
[4] Y.B. 34 Hy. VI. Mich. pl. 26. [5] Y.B. 35 Hy. VI. Mich. pl. 39.
[6] Y.BB. 18 Hy. VI. Mich. pl. 7; 36 Hy. VI. pl. 4 at p. 8 *per* Prisot; cp. for the modern law Tharpe v. Stallward (1843) 5 M. and Gr. 760; Foster v. Bates (1843) 12 M. and W. 226, 232.

point is a case of 1467, in which Littleton, Newton, and Danby agreed that if administration had been granted, and then the will was proved, the authority of the administrator was determined.[1] This case says nothing as to the effect of such determination on the acts done by the administrator while the grant was in force. But in 1565 in the case of *Graysbrook v. Fox*[2] this question came before the court. The court (Dyer, C.J., and Walsh, J., Weston, J., dissenting) decided that a grant of administration in such circumstances was void ab initio, and consequently that all acts done under it were likewise void. This result was arrived at by two parallel lines of reasoning. Firstly, the executor takes his title from the will. He is all the time the rightful representative, so that the administrator has no right to interfere with his property.[3] Secondly, the ordinary has no jurisdiction to grant administration if in fact there is an executor. Therefore its grant made under these circumstances is absolutely void.[4] Since the decision had the effect of limiting the jurisdiction of the ecclesiastical courts it is not surprising to find that it was followed in 1677 on these two grounds.[5] Nor was the law altered by the changed attitude which the courts of law later assumed towards the jurisdiction of the ecclesiastical courts to make grants of administration.[6] This particular result of the rivalry of these two jurisdictions, being based on logical grounds, had hardened into the fixed rule that, if a will appointing executors was in existence, a grant of administration was void ab initio—a rule which was followed as lately as 1905.[7] But it was obviously productive of much inconvenience and hardship; and it was barely compatible with the modification, apparently assented to by all the judges in *Graysbrook v. Fox*, that acts done in a due course of administration were valid,[8] and with the admitted legality of certain limited

[1] "*Littleton.*—Sir, un poit faire moy son executor, nient sachant a moy, et puis quant jeo aie connusance de cel, jeo puis bien entreprendre sur moy le power del administracion et disposicion, etc. Et, Sir, l'Ordinary poet bien granter un administracion en le mesme temps, come il fist icy, mes maintenant per le probate del testament, le power del administrator est determine, sinon que les executor averoit refuse a un temps devant l'Ordinary, donques paradenture le ley voil auter, et a cel entent accord *Newton* et *Danby*," Y.B. 7 Ed. IV. Trin. pl. 3 (p. 13).

[2] Plowden 276.

[3] "Then if the law, immediately after the death of the testator, vests the property and the possession of his goods in the executor, from thence it follows that the law never vests the property in the Ordinary, and from thence it follows that the law never vests the property in the administrator," ibid at p. 281.

[4] "The power or interest which the Ordinary himself had, and the power and authority which the common law or the statute 31 Ed. III. gave him to commit administration to another, is but where a man dies intestate, so that if he makes a will, such power and interest is not given," ibid at p. 280.

[5] Abram v. Cunningham 2 Lev. 182.

[6] Above 567.

[7] Ellis v. Ellis [1905] 1 Ch. 613.

[8] Plowden at p. 282; see the remarks of Phillimore, L.J., in Hewson v. Shelley [1914] 2 Ch. at p. 41.

grants of administration.[1] It was therefore overruled in 1914;[2] and the reasons given for overruling it, particularly those given in the judgment of Phillimore, L.J., contain an excellent history of the origin and development of this rule.

(iii) *The executor de son tort.*

A person who meddles with the goods of a deceased person without any title either as executor or as administrator is known as an executor de son tort. It is clear that he cannot be regarded as an administrator, because it is only a person to whom the ordinary has delegated authority by letters of administration who has this title;[3] and, as we have seen,[4] he must be named an executor if he is to be held liable to be sued. It is equally clear that he is not truly an executor, because he has not been appointed by the deceased. But it would be inexpedient to treat as a trespasser a person who had intermeddled with the goods of a deceased person, not as a mere wrongdoer, but with the intention of administering the estate, or who had done other acts which it would have been necessary for an executor to do.[5] On the other hand, it was only fair to those who had claims against the deceased to hold that a person who did acts characteristic of the office of an executor was liable as if he were really executor; and this course was the more possible where the finding of a jury that a person had administered as executor was accepted by the court as proof that he was an executor.[6] But it was not necessary to allow such a person to sue or claim any of the other rights or privileges of an executor. Thus we get the rule that the executor de son tort has none of the privileges, but all the liabilities which belong to the position of a rightful executor. This conclusion was substantially reached as early as Edward I.'s reign.[7] It was in

[1] Hewson v. Shelley [1914] 2 Ch. at p. 44 *per* Phillimore, L.J.; as Cozens-Hardy, M.R., pointed out, ibid at pp. 28-29, the form of bond provided by the Statute of Distribution 1670 "contemplates the possibility of there being a will which may subsequently be proved. It imposes an obligation on the administrator to pay debts and to distriubte the surplus. All this could not be done unless the administrator had, by virtue of the grant, the personal property vested in him."

[2] Hewson v. Shelley [1914] 2 Ch. 13.

[3] Y.BB. 18 Hy. VI. Hil. pl. 1; 21 Hy. VI. Hil. pl. 4 (p. 23) *per* Paston; ibid Mich. pl. 18 *per* Yelverton such person cannot be sued as administrator de son tort.

[4] Above 568.

[5] Y.BB. 32 Hy. VI. Mich. pl. 10 *per* Moile; 21 Hy. VI. Hil. pl. 11 *per* Paston; 21 Ed. IV. Pasch. pl. 12, *Choke* said, "L'ou home de son tort demesne administre, la il n'administra come executor, sinon qu'il fist chose come executor, come pay les dets le testator;" for a case turning on the question whether a man was a mere trespasser or an executor de son tort see Fleier v. Southcot (1554) Dyer 105b.

[6] The Eyre of Kent (S.S.) ii 55; above 539.

[7] Y.B. 20, 21 Ed. I. (R.S.) 374, *Spigurnel* said, "The two cases are not alike; for when a man ministers voluntarily the goods of the dead man, he thereby binds himself to answer to those who demand a debt against him as executor of the dead man. Now, Sir, it does not follow that, although he can bind himself to others by

harmony with the principle of the common law that a person apparently seised of an office should be treated, for some purposes at least, as its rightful holder;[1] and it was recognized also on other grounds by the ecclesiastical law. A person who does certain necessary acts before the requisite formalities have been observed is protected if those acts must necessarily have been done by a properly constituted representative; but having assumed the office he must be held to be answerable to the creditors. If a man, says Lyndwood, meddles with the administration of the goods of a deceased person without making an inventory he will be answerable to the creditors, except in so far as he has incurred debts in or about the expenses of the funeral, the probate of the will, the making of an inventory, or the necessary preservation of the goods.[2] This exception was later adopted by the common law. The lawful acts of an executor de son tort were held to be good,[3] so that acts done by him in a due course of administration are valid.[4] We do not find any clear distinction drawn in this period between the position of a man who, having done merely acts of kindness or charity, is not treated as an executor de son tort, and the position of a man who is treated as an executor de son tort because he has done acts which only an executor would be entitled to do. But we perhaps have a hint of this distinction in the passage of Lyndwood cited above, and in a dictum of Choke's in Edward IV.'s reign to the effect that some said that money spent in burying a deceased person would not make a man an executor de son tort, because it was a work of charity.[5]

The Mode in which and the Extent to which Executors and Administrators have become the Representatives of the Deceased[6]

We have seen that in the Anglo-Saxon period there is no such thing as a general representative of a deceased person;[7] and we can say the same thing of the first two and a half centuries after

his own pleasure, so that he is bound to answer for the administration which he has made, others shall be obliged to answer to him;" this was denied by *Bereford*, J.; but the law was settled in this way, see Y.BB. 33-35 Ed. I. (R.S.) 86 *per* Hengham; 12, 13 Ed. III. (R.S.) 84, 148, 150; Longo Quinto 72. It appears from Y.B. 9 Ed. IV. Mich. pl. 37 that an executor who administered without proving the will would be treated as an executor de son tort.

[1] Above 91, 99-100.

[2] Lyndwood 176 sub voc. *Prius*.

[3] Coulter's Case (1598) 5 Co. Rep. at f. 30b; and cp. Graysbrook v. Fox (1565) Plowden at p. 282.

[4] Oxenham v. Clapp (1831) 3 B. and Ad. at p. 314.

[5] Y.B. 21 Ed. IV. Pasch. pl. 12; cp. Y.BB. 21 Hy. VI. Hil. pl. 11, *per* Newton and Ascue; 33 Hy. VI. Mich. pl. 5; Stokes v. Porter (1558) Dyer 166b; for the modern law see Peters v. Leeder (1878) 47 L.J.Q.B. N.S. 573.

[6] A very good sketch of the history of the law on this subject will be found in chap. iii of Mr. Goffin's book on the Testamentary Executor.

[7] Vol. ii 96-97.

the Conquest. When Glanvil wrote a fixed share of the property of the deceased descended to the heir. He was the person to be sued for the debts, and apparently was obliged to pay them irrespective of the amount of the assets.[1] Presumably, too, he could sue for debts owing to the deceased.[2] The executor is concerned merely with the carrying out of the will of that part of his property which a testator was allowed to bequeath; and he could sue anyone, even the heir, if he was impeded in his duties.[3] If a man died intestate his kinsfolk performed the functions of an executor with respect to that part of the property which might have been disposed of by will.[4] When Bracton wrote the powers of the executor were wider. He could sue in the ecclesiastical courts on debts due to the testator, if acknowledged in his lifetime, because such debts were substantially the testator's goods; while he could be sued in the ecclesiastical courts if he had been directed in the will to pay debts due by the testator, because such direction amounted to something very like a legacy.[5] On the other hand, the heir alone could sue in the king's courts for debts not acknowledged in the testator's lifetime, and he was primarily answerable for the debts in the same courts.[6] He was not legally liable beyond the amount of the assets, in which probably we must reckon the land which he had inherited;[7] though he was perhaps considered to be morally liable.[8] Questions connected with legacies were now the concern of the executor and the ecclesiastical courts;[9] but the heir could demand that the debts be satisfied before the legacies were paid.[10] When a man died intestate his property vested in the ordinary, and it is quite in accordance with this scheme of representation that the ordinary should not be liable for the debts, seeing that even the executor was not so liable in the absence of a direction in the will to pay them.[11]

In Edward I.'s reign a change took place which was the first stage in the process by which the executor became the representative of the deceased. The executor was allowed to sue and to be sued in the king's courts.[12] This meant that the doings of the

[1] vii 5 and 8.
[2] Goffin 39.
[3] vii 7.
[4] vii 6.
[5] Bracton f. 407b; Goffin, op. cit. 40-44.
[6] Bracton f. 407b.
[7] Ibid f. 60, "Tenentur autem heredes parentum suorum et aliorum antecessorum quorum heredes extiterint testamenta servare, et eorum debita, ad quæ catalla sua non sufficiunt acquietare."
[8] Ibid f. 61, "Hæres autem defuncti tenebitur ad debita predecessoris sui acquietanda eatenus quatenus ad ipsum pervenerit scilicet de hæreditate defuncti, et non ultra, nisi velit de gratia, et si nihil multo fortius. Sed si ad ipsum aliquid aliunde pervenerit, inhumanum esset, si debita parentum insoluta remanerent."
[9] Ibid 407b; Bracton's Note Book case 381; cp. Liber Mem. de Bernewelle 176 for a tale about a disputed legacy.
[10] Bracton f. 61b.
[11] Above 568.
[12] P. and M. ii 345.

executor were as much under the eye of the royal judges as the doings of the heir. There was therefore nothing to prevent the representation of the deceased from being settled in an intelligible form. The respective rights and liabilities of the heir and the executor could be apportioned in a manner suitable to the estate which each took. The new division of functions worked out by the common law was as follows: The heir ceases to be anything more than the person who inherits the real estate of the testator. He can only be sued for the debts due to the deceased if the testator has bound him by instrument under seal in which heirs are named.[1] He cannot sue, at first if there were executors, and later whether there were executors or not. The executor takes the whole of the chattels of the testator, and becomes liable to certain of his debts so far as these assets extend, whether or no the heir is liable. He must also pay the legacies if there are sufficient assets. Thus the executor comes to represent the testator in a far truer sense than the heir, and the law gets in this way something approaching to a representation of a deceased person. It was inevitable that the position of the ordinary in relation to the goods of a deceased intestate should be affected by this new division of labour. As we have seen, he was made liable for the debts in 1285, while in 1357 he was obliged to delegate his powers to an administrator, whose position is copied from that which the executor had then assumed.[2]

In tracing the history of the process by which this change was brought about I shall deal (i) with the restrictions upon the liability and rights of the heir; (ii) with the extent of the liability of the executor; and (iii) with the right of the executor to the estate of the deceased.

(i) *Restrictions upon the liability and rights of the heir.*

In the Year Books of Edward I.'s reign it is clear that both the executor[3] and the heir[4] are liable to be sued by the creditors of the deceased. In Edward II.'s reign the heir is liable on a specialty in which heirs have been named,[5] and (possibly) the executors are not liable in that case.[6] But the executors are liable on a specialty in which the heirs have not been named,[7] and they, and not the heir, are liable on a covenant in a lease for years.[8]

[1] "Et notandum quod heres non tenetur in Anglia ad debita antecessoris reddenda, nisi per antecessorem ad hoc fuerit obligatus, præterquam debita Regis tantum, et super hoc fit Statutum tale in Magna Carta (§ 9, 1215)," Fleta II. 62. 70; Britton i 163.

[2] Above 568-569.

[3] Y.BB. 21, 22 Ed. I. (R.S.) 456, 614; 30, 31 Ed. I. (R.S.) 238.

[4] Y.B. 21, 22 Ed. I. (R.S.) 514-518.

[5] Y.B. 3, 4 Ed. II. (S.S.) 198-199.

[6] Eyre of Kent (S.S.) ii 43-44.

[7] Ibid.

[8] Y.B. 6 Ed. II. (S.S.) (1310-1311), 149.

The law is evidently approaching its final position, but it has not yet quite reached it. In Edward III.'s reign it is laid down that the heir can only be sued on an obligation of an ancestor in which heirs have been named; and that though the heir can be sued on such an instrument, the executors are equally liable to be sued.[1] Conversely, in Edward I.'s reign both the executors[2] and the heir[3] sue for debts due to their ancestor; but early in Edward III.'s reign it was laid down that, even if an obligation were made in favour of a man and his heirs, the action upon it "was given naturally to executors and not to the heir, unless it be for default of executors;"[4] so that the executor could, if he liked, release such an obligation. The reporter adds a note to the effect that "the opinion of the court in this case was that while there is an executor living, who represents the estate of the testator, the heir shall not have an action."[5] In the time of Coke, the heir, it was said, could never sue; and there is no proviso as to the existence of executors.[6] In fact, the creation of the office of administrator in 1357, who must be appointed in all cases in which no executor was created, had taken away the meaning of this proviso.[7]

It is not difficult to see why the law thus came to allow the executor to oust the heir. The produce of the debt was clearly a chattel. It was taken by the executor in his representative capacity, and applied by him in a due course of administration. The heir had nothing to do with the administration of the estate. Any debt he recovered he took for himself; and he was only answerable if the ancestor had left any obligations under which he was especially bound.[8] It was thus essential to the proper administration of the estate to take away from the heir the right to sue and to give it to the personal representative. But one inconvenient consequence followed from the position which the heir assumed. Seeing that he took the real estate, and seeing that he was no longer liable for debts, except specialty debts in which heirs had been named, the real estate escaped from all liability to

[1] Y.BB. 21 Ed. III. Pasch. pl. 28 (p. 9); 27 Ed. III. Trin. pl. 23 and 29; see Anon (1537) Dyer 14a.

[2] Y.B. 20, 21 Ed. I. (R.S.) 374.

[3] Y.B. 21, 22 Ed. I. (R.S.) 514-518; c.p. Y.B. 12, 13 Ed. III. (R.S.) 168.

[4] Y.B. 14 Ed. III. (R.S.) 96; cp. Y.BB. 45 Ed. III. Trin. pl. 4; 46 Ed. III. Pasch. pl. 7; Y.B. 18, 19 Ed. III. 406, action of account was denied to the heir.

[5] Y.B. 14 Ed. III. (R.S.) 100.

[6] Co. Litt. 8a, "but of ancient time the heir was permitted to have an action of debt upon a bond made to his ancestors and his heirs, but the law is not so holden at this day."

[7] Above 568-569.

[8] "Executors do not demand as in respect of what is due to them, but of what was due to the testator; but the heir demands as in respect of what is due to himself and for his own profit," *per* Shardelowe, J., Y.B. 12, 13 Ed. III. (R.S.) 168, 170.

the other debts of a deceased person.[1] Testators sometimes charged their land with the payment of their debts at the end of this period.[2] But it was not till the last century that real estate was made generally available to pay the debts of a deceased person.[3]

(ii) *The extent of the liability of the executor.*

Both the extent of the liability of the executor and the extent of his right to sue have been affected by the maxim *actio personalis moritur cum persona.* Therefore, before I say anything in detail as to the extent of the executor's liability, I shall, by way of preface, say something of the history and scope of this maxim.[4]

"Though," says the late Professor Goudy, "this is one of the most familiar maxims of English law, the veil of obscurity covers not only its origin but its true import and significance."[5] It is not derived from the classical Roman law, nor is it to be found in the writings of the mediæval civilians or canonists;[6] and it is not to be found in its modern shape in the Year Books.[7] Something very like it appears in the argument of *Russel and Prat's Case* in 1590;[8] but it would seem that its first appearance in its modern shape is in Coke's report of *Pinchon's Case* in 1609.[9] It is quite possible that it was given its modern shape by Coke himself who, as Thayer has pointed out,[10] was a great inventor of Latin maxims. But, if this be true, the maxim when it first appeared in its modern shape was both untrue and misleading. *Pinchon's Case*, as we have seen,[11] finally settled that the maxim did not as a rule apply to the action of assumpsit brought to enforce a simple contract; and this meant that it did not, save in exceptional cases, apply to causes of action in contract. Generally it was applicable only to causes of action in tort; and this has given rise to the conjecture that for "personalis" we should read "pœnalis."[12] There is no warrant for this conjecture if it be true that the maxim in its modern shape first made its appearance in *Pinchon's Case;* but it is probable that it was the maxim thus amended, or something like it, which the judges in *Pinchon's Case* had in their minds.

[1] Possibly it did not so escape in Bracton's day, above 573.
[2] See e.g. Test. Ebor. i. 248 (1398); iii 40 (1405).
[3] 1 William IV. c. 47 § 9; 3, 4 William IV. c. 104.
[4] On the whole subject see Goudy, Essays in Legal History (1913) 216-227.
[5] Op. cit. 216, 218, 219.
[6] Ibid 216, 222.
[7] Ibid 225-226.
[8] "This action is personal and moritur cum persona; for it is grounded upon a personal wrong," 4 Leo. 44.
[9] "Another reason was added, that this action on the case on assumpsit is *actio personalis quae moritur cum persona*," 9 Co. Rep. at f. 87a.
[10] Evidence 185 n. 4; it is there pointed out that Coke was quite possibly the inventor of the maxim "ad quæstionem facti non respondent judices, ad quæstionem juris non respondent juratores;" see vol. i 298 n. 8.
[11] Above 452.
[12] Pollock, Torts (5th ed.) 58 n. (*b*).

Bracton, in a confused passage on the subject of the extinction of obligations,[1] tells us that an obligation is "got rid of by the death of either of the contracting parties or of both, especially if it is a penal obligation or a simple one; but if it be a double one, namely penal and for recovery, it is got rid of as far as it is penal and it does not extend to the heirs, nor is it allowed to the heirs, because a penalty binds the original parties, and is extinguished with the person;" and, in another passage, he tells us that, "Personal actions lie against him who has contracted and his heir, unless they be penal."[2] It is probable that in these passages Bracton is giving his own view of the law;[3] and his idea seems to be that any obligation which is penal dies with the person; but that an obligation to restore something does not. But this leaves very much at large the question what obligations are penal and what are not. This matter, as we shall see directly, was settled, not by attempts to define accurately what obligations were pœnæ and what were rei persecutoriæ, but by the elaboration of the technical rules applicable to the different forms of personal action.[4] In this question of the survival of rights of action, as in the formation of a theory of contract,[5] the common law gradually grew up round the actions. But it would seem that Bracton's general statement, which was copied by Fleta,[6] had just sufficient influence to make English lawyers think and say that an action of an obviously penal kind, such as an action of trespass, *moritur cum persona*. Thus in 1410 Hankford agreed with Thirning that executors could not be made liable for the trespasses of their testator "because the action dies with the person;"[7] and this was repeated by Newton in 1440,[8] and by Fineux in 1521.[9]

The last cited case was the earliest case in which it was held that a cause of action in assumpsit did not die with the person;

[1] "Item tollitur (obligatio) morte alterius contrahentium, vel utriusque, maxime si sit pœnalis, vel simplex. Si autem duplex, scilicet pœnalis et rei persecutoria, in hoc quod pœnalis est tollitur, et non extenditur contra heredes, nec datur heredibus, quia pœna tenet suos auctores et extinguitur cum persona," f. 101a, cited Goudy, op. cit. 222.

[2] "Personales vero actiones . . . locum habent adversus eum qui contraxit, et heredem suum, nisi sint pœnales," f. 102a, cited Goudy, op. cit. 224.

[3] Goudy, op. cit. 223.

[4] Below 578, 581.

[5] Above 413-414.

[6] II. 60. 9.

[7] "*Thirning.*—En vostre case les executors ne serront my charges, n'en nul auter case, mes lou lour testator fuit oblige en certein duity, car s'il moy fist trespass, jeo n'avera action vers ses executors. *Hankford.*—De trespass il est voier, pur ceo que l'action mourst ove le person," Y.B. 11 Hy. IV. Hil. pl. 20 (p. 46).

[8] "La Ley est, si on face a moy trespass, et meurt, l'action est mort auxy, pur ce que serra inconvenient a recoverer envers aucun qui ne fuit partie al tort," Y.B. 19 Hy. VI. Pasch. pl. 10, cited Goudy, op. cit. 225.

[9] "*Et Fineux Chief Justice dit* que ce est hors del cas ou *actio moritur cum persona;* car ce est ou le hurt ou damage est corporel; come si on me bate et devie, ma accion est alle; ou si jeo devie, mes executors n'auront accion, car le party ne poit esse punie quand il est mort," Y.B. 12 Hy. VIII. Mich. pl. 3.

and we have seen that the law was not so settled till some time later.[1] In distinguishing the case before the court from cases where actions died with the person the Chief Justice lays it down that actions die with the person only when they are brought for corporal damage.[2] Clearly this restricts the rule far more narrowly than the earlier cases. But though his view as to the non-applicability of the rule to assumpsit brought upon a contract prevailed, his view that only those actions died with the person which were brought for corporal injuries did not prevail; nor was a later attempt of Dodderidge, J., to limit its scope by the invention of a class of quasi-contractual rights, to which it did not apply, any more successful.[3] Trespass or one of its off-shoots was coming to be the form of action used for all torts to person or property. But trespass and its off-shoots were so obviously of a penal character that it was with difficulty that an exception was made in favour of assumpsit. It is not therefore surprising that no further concession was made. The result was that the rule as to non-survivorship was applied to all causes of action in tort whether to person or property; and it is only as the result of the legislation of the nineteenth century that it has been limited in the manner suggested by Fineux.

Thus, long before the maxim took its modern shape, the idea that actions died with the person had come to be confined mainly to actions in tort; and this, historically, is the reason why the term *personalis* has, in this connection, always received this limited meaning.[4] But, if we turn from the consideration of the meaning of the maxim when it first appeared in its modern shape to the actual rules of the common law in the thirteenth century, we shall see that the maxim, if it had then been known, would have been nearly true in its literal sense.[5] Subject to a modification, with which I shall deal directly,[6] the only personal action which could be brought against the executor in his representative capacity was the action of debt or covenant upon a contract under seal made by the testator. It is true that in Edward I.'s reign it seems to have been thought that debt would lie against executors even though there was no sealed writing.[7] But in Edward III.'s reign it was held that debt would never lie against executors if the testator might have waged his law.[8] Account did not lie against executors till 1705,[9] nor did

[1] Above 451-452. [2] Above 577 n. 9.

[3] See Le Mason v. Dixon (1628) W. Jones 173.

[4] See Russel and Prat's Case (1590) 4 Leo. 44, cited above 576 n. 8.

[5] Cp. Finlay v. Chirney (1880) 20 Q.B.D. at pp. 502-503 *per* Bowen, L.J.

[6] Below 579.

[7] Y.BB. 21, 22 Ed. I. (R.S.) 456; 30, 31 Ed. I. (R.S.) 238.

[8] Y.B. 17, 18 Ed. III. (R.S.) 512 *per* Shardelowe; cp. Y.BB. 41 Ed. III. Trin. pl. 3; 2 Hy. IV. Hil. pl. 12.

[9] 4, 5 Anne c. 16 § 28; "Account fuit chose en privity perenter les parties mesme, le que estranger ne poet aver perfect conusance," Le Mason v. Dixon (1628) W. Jones at p. 174 *per* Jones, J.

trespass till 1834;[1] so that it was only if the testator had bound himself by specialty that the executor was liable. It was not till the fear of the chancellor's growing jurisdiction induced the common lawyers to permit the action of assumpsit to be brought against executors that any great inroad was made upon the main principle;[2] and at the present day there are certain causes of actions both in tort[3] and in contract[4] to which the maxim is still applicable.

I have said that the generality of the maxim was subject to one modification. It was held in 1583 in *Sherrington's Case* that the representatives of a deceased person were liable for a wrong done by the deceased in so far as that wrong had actually enriched his estate.[5] It is probable that this principle, though then clearly stated for the first time, had been recognized at a much earlier period.

We have seen that Bracton laid it down that an obligation to restore property did not die with the person.[6] In conformity with this view of the law it was assumed in 1312 that executors were liable to restore a writing bailed to their testator;[7] and in 1343 it was held that executors were obliged to answer to an action of detinue brought against them in respect of a horse bailed to their testator.[8] In the last cited case it was argued that they were not bound to answer without a specialty. Sharshulle and Willoughby, JJ., held that they were bound to answer for the detinue of their testator without a specialty—whether or not they were obliged to answer for their own act in detaining it.[9] In Henry IV.'s reign a similar case was discussed several times at great length.[10] Hankford said that it had often been matter of dispute whether detinue lay against executors on a bailment made to their testator without specialty, and that it had been decided that the action lay.[11] It was decided in that case that the action lay against the executors

[1] 3, 4 William IV. c. 42 § 2.

[2] Above 451-452; Goffin, op. cit. at p. 57, points out that, before assumpsit was used, the rule that debt would not lie against executors was sometimes evaded by using the writ Quominus.

[3] See Hatchard v. Megé (1887) 18 Q.B.D. 771.

[4] "All contracts for personal services which can be performed only during the lifetime of the party contracting are subject to the implied condition that he shall be alive to perform them; and should he die his executor is not liable to an action for the breach of contract occasioned by his death," Hall v. Wright (1858) E.B. and E. 746, 793; cp. Finlay v. Chirney (1888) 20 Q.B.D. 494.

[5] Savile 40.

[6] Above 577.

[7] Y.B. 5 Ed. II. (S.S.) (1312) 155-156.

[8] Y.B. 17, 18 Ed. III. (R.S.) 510-516.

[9] At p. 514, "*Willoughby*.—We shall record that you have not any specialty. *Sharshulle* to *Thorpe*.—He (the opposing counsel) puts you to answer as to your own act; but we adjudge that you do answer without a specialty. *Willoughby* to *Thorpe*.—Answer."

[10] Y.BB. 11 Hy. IV. Hil. pl. 20; 13 Hy. IV. Hil. pl. 2; 14 Hy. IV. Hil. pl. 30 and 37.

[11] Y.B. 11 Hy. IV. Hil. pl. 30 p. 46.

in their representative capacity.[1] In Henry VI.'s reign it seems to have been thought that if executors dealt with another's goods as their own the plaintiff might either sue them in their representative capacity by writ of detinue, or personally by writ of trespass, "for the executor is obliged by law to know the goods of his testator through the inventory."[2]

It would appear from these cases that it was recognized from the days of Bracton onwards that executors were not entitled to retain goods which in fact did not belong to their testator; and this was substantially the ground of the decision in *Sherrington's Case.* In that case Manwood, C.B., said:[3] "In each case where any price or value is placed on the thing in respect of which the offence has been committed, though he who committed the offence has died, the executors shall be charged for that offence. In this case the information is for the cutting of oaks of the value of £100 and for taking twenty oxen of the queen worth £20, and the executor will be charged. But when the action or information is for treading down grass, etc., the executor will not be charged." Though, according to the report, no earlier cases were cited, the decision was in harmony with the line of decisions which allowed detinue to be brought against executors in their representative capacity; and it was followed in 1628 in the case of *Le Mason v. Dixon.*[4] "If," it was said, "J.S. wrongfully takes goods and dies, and the goods are still in existence, trespass does not lie against the executor of J.S., but if the executors have the goods in their possession, then detinue lies against them on their own possession." As detinue also lay if the defendant had by his misconduct disabled himself from delivering the goods,[5] it would seem that on principle it would also lie against the executors in their representative capacity, if the testator had consumed or destroyed the goods.

In the course of the seventeenth and eighteenth centuries detinue was practically superseded either by assumpsit or by trover. The rights of the parties formerly protected by detinue could be regarded as depending either upon an implied contract, to enforce which the courts had, as we have seen,[6] extended assumpsit in the seventeenth century; or as depending upon a

[1] Y.B. 14 Hy. IV. Hil. pl. 37 pp. 29, 30.

[2] Y.B. 34 Hy. VI. Mich. pl. 42 p. 24, "*Prisot.*—Si jeo baile biens a un auter a saufment garder, lequel apres face ses executors et devy, jeo recovera damages envers les executors pur memes les biens. *Yelverton* luy interrupta.—Vous purrait avoir bref de Detinue. *Danby.*—Ou bref de Trespass s'il veut. . . . *Yelverton.*—Chescun trespass est suppose le fait del defendant meme, car si l'executor prend mes biens c'est de son tort demesne; car il est oblige per Ley de conustre les biens son testator par un Inventory, etc., et en tiel bref de trespass envers les executors, ils ne sont my nomes executors, etc. *Prisot.*—Si soit bref de Detinue il covient de nomer eux executors, etc. *Danby.*—Le pleintif eslira a sa volonté."

[3] (1583) Savile, 40.

[4] W. Jones 173.

[5] Above 350.

[6] Above 448-450.

quasi-contract, to enforce which assumpsit had, as we shall see,[1] been extended in the course of the eighteenth century. Alternatively these rights were protected by the action of trover; for, as we shall see,[2] this action had, in the course of the sixteenth and seventeenth centuries, been so extended that it covered practically the whole field of detinue. But whereas assumpsit had developed into an action of a distinctly contractual nature,[3] trover always retained its delictual characteristics. For that reason trover never lay against the representative of a deceased person—being delictual in its nature the maxim *actio personalis, etc.*, applied to it.[4] After full consideration Lord Mansfield reasserted this principle in the case of *Hambly v. Trott* in 1776;[5] but he recognized the injustice which would ensue if a person who had been deprived of his property was left without a remedy in consequence of the death of the tort feasor; and he was careful to point out that he only decided that trover would not lie because the injured party had in fact another remedy.[6] "In most if not in all cases," he said,[7] "where trover lies against the testator, another action might be brought against the executor, which would answer the purpose. An action on the custom of the realm against a common carrier is for a tort and supposed crime; the plea is not guilty; therefore it will not lie against an executor. But assumpsit which is another action for the same cause will lie: So if a man take a horse from another, and bring him back again; an action of trespass will not lie against his executor, though it would against him; but an action for the use and hire of the horse will lie against the executor."

Thus in the eighteenth century, this modification of the maxim was enforced, not as in the Middle Ages by means of the action of detinue, but by means of the action of assumpsit. This change in the character of the remedy naturally produced some uncertainty as to the exact extent of the modification. It is clear from *Hambly v. Trott* that Lord Mansfield was prepared to give it a very wide extension. This is shown both by his judgment in that

[1] Bk. iv Pt. II. c. 3 § 3.
[2] Ibid c. 2 § 1.
[3] Above 451-452.
[4] Baily v. Birtles (1663) T. Raym. 71.
[5] 1 Cowp. 371.
[6] "The fundamental point to be considered in this case is, whether, if a man gets the property of another into his hands it may be recovered against his executors in the form of an action of trover, where there is an action against the executors in another form. It is merely a distinction whether the relief shall be in this form or that. Suppose the testator had sold the sheep, etc., in question: in that case an action for money had and received would lie. Suppose the testator had left them in specie to his executors, the conversion must have been laid against the executors. . . . Suppose the testator had consumed them, and had eaten the sheep; what action would have lain then? Is the executor to get off altogether? I shall be very sorry to decide that trover will not lie, if there is no other remedy for the right," 1 Cowper at p. 373.
[7] Ibid at p. 375.

case and by the manner in which, as we shall see,[1] he extended the sphere of assumpsit to cover all cases in which the defendant had unjustly enriched himself at the expense of the plaintiff. Its limitations were drawn somewhat more narrowly by *Phillips v. Homfray*.[2] It was there held that it only extended to the case where the defendant had got property belonging to the plaintiff and had added it or its proceeds to his estate; and that it did not extend to other incidental advantages reaped by the wrongdoer.[3] In that case, for instance, the deceased's estate was held to be liable for the value of the minerals which he had wrongfully taken from beneath the plaintiff's land, but not for the deceased's trespass beneath that land, or for anything for way-leave in respect of passages used by him under the land. This decision no doubt clearly defines the extent of the modification; but the passage cited above[4] from Lord Mansfield's judgment would seem to indicate that he would have agreed rather with the dissenting judgment of Baggallay, L. J., than with the judgment of the majority of the court. Liability for the use and hire of a horse taken by a deceased person does not seem to differ materially from liability for the use of passages under the plaintiff's land. In both cases it is clear that the damages are unliquidated and given for an indirect benefit. In fact it would probably be true to say that the law, as settled by the majority of the Court of Appeal, represents the extent of this modification as shaped by the action of detinue more correctly than its extent as shaped by the action of assumpsit. From this point of view it is a remarkable reversion to the rule of the mediæval common law.

We may well wonder that the law of this period tolerated so restricted a view of the executor's liability for the acts of the deceased. That it produced inconvenience we can see from the applications made to the chancellor at the end of this period.[5] We may remember, however, that it was in practice mitigated by the very frequently recurring directions in wills that executors were to pay debts and to make restitution for wrongs done by the deceased,[6] while, if a person died intestate, the administrator was bound to employ part of his estate in pious uses for the good of his soul; and the payment of debts and restitution for injuries were recognized

[1] Bk. iv. Pt. II. c. 3 § 3. [2] (1883) 24 C.D. 439.

[3] "When there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff, and the damages which have been done to him are unliquidated and uncertain, the executors of a wrongdoer cannot be sued merely because it was worth the wrongdoer's while to commit the act which is complained of, and an indirect benefit may have been reaped thereby," ibid at p. 455.

[4] Above 581. [5] Below 583.

[6] See e.g. Test. Ebor. i 59, 60, 159, 226; ii 69, 130; for an elaborate clause of this nature in Henry VII.'s will see Test. Vet. 27, 28.

by some as pious uses.[1] No doubt in this period, when the ecclesiastical courts did exercise some kind of supervision over the representative, debts were paid and restitution was made which could not have been enforced at common law. When their jurisdiction decayed there was no sufficient guarantee that executors or administrators would thus fulfil the intentions of the testator. They could make use of the rivalry between the common law courts and the ecclesiastical courts; and, alleging that there were outstanding debts, they could escape their obligations to the deceased.[2] It is significant that in 1454 a suitor appealed to the Chancellor to force an executor to make restitution in accordance with the directions of his testator, alleging that he could get no remedy either at common law or in the ecclesiastical courts.[3] It is probable that a feeling that the executor's liability ought to be enlarged, combined with the desire to compete with the Chancery, to induce the common lawyers to allow that an executor could be made liable in an action of assumpsit.

(iii) *The right of the executor to the estate of the deceased.*

That all the chattels of the deceased were vested by law in the executor,[4] that he took them in a representative capacity,[5] that it did not matter therefore whether he personally was villein or outlaw, or suffering from any other disability,[6] were well settled principles in this period. Even those chattels of the deceased which had been left as a legacy vested in him. The legatee had no title till the executor had consented to the legacy.[7] On the other hand, it was recognized by the ecclesiastical courts that the executor, as he held the place of the Roman *heres*, was entitled to take beneficially property not otherwise disposed of; and this rule

[1] Lyndwood 180 sub voc. *Pias Causas*, "Idem est secundum quosdam in his quæ legantur pro emendandis forefactis."

[2] Above 556-557; Swinburn, Testaments 277, says, "Of this distribution of the residue (*in pios usus*) there is but small use in these days, as well for that the residue is commonly left to the executors, as also for that the executors are afraid that some unknown debts due by the testator should afterward arise;" at pp. 254b, 255, he tells us how debts are "thrust into the inventory," whereby the legatees and children are defrauded.

[3] "And howe be it that he hath often tymes required oon Sir John Depden, preest, executour of the testament and last will of the said late Bisshop, to make restitucion of the said xx marc according to his last will, the which will was that if he had unduely offended eny man or injustly receyved the goodes of eny persone, that his executours shold duely satisfie theym therfore as right wold, yet the said Sir John Depden it utterly refuseth, contrary to the will of the said late Bisshop," Select Cases in Chancery (S.S.) 136-137.

[4] Y.B. 14 Hy. IV. Hil. pl. 37 (p. 28) *per* Thirning; cp. Y.BB. 20 Hy. VII. Mich. pl. 14; 21 Hy. VIII. Trin. pl. 14 *per* Fitzherbert.

[5] Y.BB. 12, 13 Ed. III. (R.S.) 168, 170; 17, 18 Ed. III. (R.S.) 356; cp. Goffin, 54, 55 criticizing Holmes's views in H.L.R. ix 42; below 587 n. 6.

[6] Y.BB. 18 Hy. VI. Pasch. pl. 4 *per* Fortescue; 21 Hy. VI. Hil. pl. 17; 21 Ed. IV. Mich. pl. 8.

[7] Y.B. 2 Ed. IV. Mich. pl. 1 *per* Ashton.

was accepted by the common law courts, and applied a good deal more absolutely and rigidly than it was applied in the ecclesiastical courts.[1] It is with respect to the choses in action to which the deceased was entitled that more question arises. There can be no doubt that the maxim *actio personalis moritur cum persona* applied to the right of the executor to sue as well as to his liability to be sued. But the legislature intervened to give the executor rights of action at a much earlier date than it intervened to place him under legal liability. Perhaps this was due to the fact that the directions of testators in their wills to redress injuries, and the powers of administrators to do their best for the soul of the deceased, rendered the absence of legal liability less onerous in practice than the absence of a legal right to sue would have been.

From Edward I.'s reign onwards the executor could always sue in debt or detinue.[2] In 1285 he was allowed to bring the action of account.[3] In 1330 the statute "de bonis asportatis in vita testatoris" allowed him to sue for trespasses done to the goods and chattels of his testator;[4] and this eventually gave him the right to bring either detinue, trespass, trespass on the case, or trover in appropriate cases in respect of different wrongs to these goods and chattels.[5] In 1350 these rights were extended to the executors of executors;[6] and the effect of the statute of 1357 was to give administrators the same rights.[7] No question was ever raised, nor could it be, as to their right to bring the action of assumpsit. But in respect of those contracts which were of such a personal nature that the representative could not be sued upon them, he could not sue;[8] and he could not recover for injuries to the real estate of the deceased. The statute of William IV.'s reign, which provided for the liability of the representative, provided also for his right to sue

[1] For the ecclesiastical law see below 592 n. 2; for the common law see Perkins, Profitable Book § 525; in later law the equitable modifications of the common law rule, see Bl. Comm. ii 514-515, produced rules more akin to the rules applied at this period in the ecclesiastical courts.

[2] Above 575; the rule as to wager of law which curtailed the liability to be sued (above 578) clearly cannot apply, see Y.B. 3, 4 Ed. II. (S.S.) 21; the Eyre of Kent (S.S.) ii 40-41.

[3] 13 Edward I. st. 1 c. 23. In a MS. of a register of the early years of Edward I. (vol. ii App. Vd (6); H.L.R. iii 214) there is a statement that "ut dicitur" executors may bring account against a bailiff of the deceased, though the heir cannot; but it is said that the ecclesiastical courts also have jurisdiction in such case.

[4] 4 Edward III. c. 7.

[5] See Russel and Prat's Case (1590) 4 Leo. 44—it is clear that there was some hesitation about allowing trover; cp. Twycross v. Grant (1878) 4 C.P.D. at p. 45 *per* Bramwell, L.J.

[6] 25 Edward III. st. 5 c. 5.

[7] Above 568-569; thus it was assumed in Y.B. 36 Hy. VI. pp. 7, 8 that 4 Edward III. c. 7 applied to administrators; cp. Smith v. Colgay (1595) Cro. Eliza. 384, where it was resolved, without argument, that they might sue by the equity of the statute.

[8] Above 579 n. 4; Chamberlain v. Williamson (1814) 2 M. and S. 406.

for injuries to the real estate.[1] Thus both the active and passive transmission of liabilities have been put upon a similar basis. The maxim *actio personalis moritur cum persona* is still part of the law; but the exceptions have to a large extent eaten up the rule.

The Position of the Representative at Common Law and in the Ecclesiastical Courts

(1) *At common law.*

All the chattels of the deceased were vested in the representative. He could sue the deceased's debtors and could be sued by the deceased's creditors on such obligations as survived the death. When there were several representatives the act of one was the act of all;[2] but they must, if they were suing or being sued in their representative capacity, be all joined in the writ,[3] unless the one not joined had been summoned, and, by judgment of the court, severed.[4] In the case of executors it was necessary to join even those who had refused office.[5]

It was from the point of view of the right of the representative to the property of the deceased, and more especially from the point of view of his right to sue and liability to be sued, that the common law considered his position; and the common law has never really attempted to adopt any other point of view. As we have seen, questions as to those beneficially entitled to the property of the deceased, whether on intestacy or by way of legacy, were matters for the ecclesiastical courts. If the common law courts noticed such questions they contented themselves with following the rules which the ecclesiastical courts applied.[6] But, though a large class of questions were thus outside the sphere of the common law courts, the questions which they did entertain necessitated the growth of a certain number of rules dealing with the administration of the estate. It is with these common law rules, some of which are still part of

[1] 3, 4 William IV. c. 42 § 2.

[2] Y.BB. 21, 22 Ed. I. (R.S.) 258; 38 Ed. III. Pasch. p. 9; the rule was the same in the ecclesiastical courts, and the similarity was noted by John of Ayton at p. 108.

[3] Y.BB. 33-35 Ed. I. (R.S.) 84, 238, the Eyre of Kent (S.S.) ii 41-42 (executors suing); 47 Ed. III. Mich. pl. 50 (executors being sued); cp. Y.B. 3 Hy. VI. Mich. pl. 6 where the rule is accepted as well settled.

[4] Y.B. 5 Ed. II. (S.S.) (1312) 13; in later law summons and severance became the centre of a mass of technical rules and distinctions, see Read and Redman's Case (1613) 10 Co. Rep. 134a.

[5] Y.B. 49 Ed. III. Pasch. pl. 10 at p. 17; this rule was the law till 20, 21 Victoria c. 77 § 79, the reason being that the executor, being appointed by the testator, could, though he had refused to prove the will, change his mind; the only case to the contrary seems to be that in Y.B. 18 Ed. II. 613, and even in that case it is not clear that the same rule was not applied; that it was law in Edward I.'s reign may be gathered from Y.B. 33-35 Ed. I. (R.S.) 86.

[6] Above 554; John of Ayton 109; Lyndwood 169 sub voc. *De Damnis;* Y.B. 10 Hy. IV. Mich. pl. 2 *per* Gascoigne, C.J.

the law, though partially concealed by an elaborate equitable superstructure erected upon their foundation, that I shall deal in this section.

The fundamental principle which the common law applied to determine the position of the representative I take to be somewhat as follows: The representative has certain powers and certain duties. In the exercise of his powers he can assert his title to the property, and can deal with it freely for the purpose of duly administering the estate. As against third parties he will be treated as the owner, even if he is only one of several representatives,[1] so that he can give third parties a good title. But as against the creditors of the estate he is bound to exercise his powers properly; and though they cannot follow the property alienated and recover it from third persons, yet they can hold the representative personally liable if he has misused his powers.[2] Similarly the representative must pay the debts of the deceased; but he is only liable to pay out of the property of the deceased. When the property has all been paid out in a due course of administration he can plead "plene administravit," and, if he proves his plea, judgment will be entered for him. But here again he will be personally liable if the property has been paid out otherwise than in a due course of administration.[3] As with his powers so with his duties, any irregularity of conduct means personal liability. This is the sanction which the common law employs to enforce fulfilment of its rules as to administration. That this principle is applied throughout all the rules of administration which the common law has evolved in this period will be clear if we look at some of the rules relating firstly to the powers of the representative and secondly to his liabilities.

(i) The representative has the right to dispose of the estate for the payment of debts; but by Edward IV.'s reign certain rules had been laid down as to the order in which these debts were payable. Debts of record come first, then debts by specialty, and lastly other

[1] Y.BB. 42 Ed. III. Mich. pl. 12 (Trespass); 38 Ed. III. Pasch. p. 9 (Debt); for a statement of this principle in modern law see Scott v. Tyler (1788) 2 Dick. at p. 725 *per* Lord Thurlow.

[2] Y.B. 9 Hy. VI. Hil. pl. 2 *Cottesmore* said, "Peut etre qu'ils (the executors) ont vendu les biens a auters persons, et il n'est raison que les biens loyalment achetes per auters persons soient pris hors de lour possession (*ad quod tota curia concessit*), et en tiel cas les executors seront charges de lour biens propres . . . ils poient vendre devant jugement rendu, et donc ils seront chargés de lour biens propres (and not in respect of the testator's goods alienated before judgment) *per totam curiam*."

[3] Y.B. 11 Hy. VI. Mich. pl. 12 *Danby* said, "Si un executor fait sicome il appartient al executor a faire, il ne sera charge forsque de biens le mort; come s'ils pledent *Pleinment administre*, ou qu'il ad un auter coexecutor, etc., tout soit que ceo soit trouve encontre luy, il ne sera charge forsque des biens le mort: mes executor per son fait demesne peut alterer l'action le pleintif et luy charger de ses propres biens; come s'il ust plede *Onque executor ne onque administre come executor* ou faux acquittal que est trouve encontre luy;" cp. Y.BB. 17, 18 Ed. III. (R.S.) 362; 11 Hy. IV. Trin. pl. 3.

debts; and in any class of debts those owing to the king had the priority.[1] No legacies were payable till debts were satisfied.[2] A representative who paid legacies before debts, or who paid debts in the wrong order, would not succeed in proving a plea of "plene administravit."[3] He would be personally liable just as if he had wasted (*devastavit*) the assets of the deceased. But if nothing of this kind could be alleged against the representative the mere fact that a creditor had not been paid would not give him any cause of complaint, and a plea of "plene administravit" would be an answer to his action. It will be clear that this procedural rule is really the root of the doctrine of preference. The action of the representative who pays a creditor in a due course of administration cannot be questioned.[4]

Very much the same principle was applied to other dealings by the representative with the assets. Thus, if an executor traded with the assets of a deceased person (a power sometimes specially conferred by will)[5] he could sue in his own name; for, as regards third parties, he has power to deal with the assets as he pleases, though as regards the estate of the deceased he must account for all the profit which he receives. This point was very neatly raised and decided in an action brought upon a writ of account shortly reported in the Year Book of 18 Henry VI. as follows:[6] "A married woman brought a writ of account, alleging that the defendant received so much from her to trade with to her use. The defendant pleaded that at the time of the receipt supposed the plaintiff was a married woman. The plaintiff replied that long before her marriage the money belonged to such a one who had made her his executrix. The question was whether this replication was sufficient to maintain the action or no, seeing that the declaration alleged a receipt to the use of the woman, and seeing that a married woman,

[1] Y.B. 21 Ed. IV. Pasch. pl. 2; cp. Y.B. 11 Hy. VII. Hil. pl. 1; Dean of Exeter v. Trewinnard (1553) Dyer 80a.

[2] Y.B. 21 Ed. IV. Pasch. pl. 2 *per* Choke and Brian; cp. a discussion of the question by John of Ayton, p. 109; it is to be noted in view of this discussion that in the Y.B. above cited Littleton seemed to hold the view that unless the debts were due to the king no devastavit was committed by paying legacies first.

[3] Cp. Y.B. 9 Ed. IV. Trin. pl. 4 p. 13a *per* Choke and Brian.

[4] Above 586.

[5] See e.g. Test. Ebor. i 85 (1368).

[6] Y.B. 18 Hy. VI. Pasch. pl. 3; cp. Y.BB. 11 Hy. VI. Pasch. pl. 27, "*Nota* que fuit dit per *Babington* que si executor fait marchandise ove les biens le mort, que l'increse que vient de cet marchandise sera adjuge les biens le testator come les principals biens;" 17, 18 Ed. III. (R.S.) 356 *per* Shardelowe. Probably it is this freedom allowed by the law to the executors in dealing with the assets as their own *qua* third persons which accounts for the strictness of the liability of the executor for the safe custody of such assets; there is, in fact, no need to suppose, as Holmes does, H.L.R. ix 46, a survival from the time when the assets were regarded as the executor's own; the principle would be the same as that applied to the bailee, above 337.

notwithstanding the fact that she was an executrix, could not hold goods to her own use, though she could dispose of them to the use of the testator. But it was held that the action lay because she did hold to her own use, so far as third parties were concerned; though, when the third party had paid the money, and the woman had received it, she had the whole of it to the use of the testator."

What were the rights of the representative to or from whom a debt was due from or to the deceased were not very clearly defined by the common law till the last half of the sixteenth century.

(*a*) If a debt was due to the representative from the deceased it would seem that the ecclesiastical courts had always allowed him to retain it;[1] and there was authority for this view in the Year Books. "Suppose," said Willoughby, J., in 1346, "your debtor makes you his sole executor, and you have administration of his goods, in that case you cannot recover anything, but you will take it yourself *de la plus belle*, and that will be allowed to you before the Ordinary on your account."[2] On the other hand, the view seems to have been held in some of the Year Books that if a creditor were made sole executor, the debt disappeared, because there was now no one against whom an action could be brought for the sum other than the creditor himself; and a man cannot sue himself; but that the rule did not apply if there were coexecutors, because the one could then sue the other.[3] This view had been rejected in 1346 by Willoughby, J.,[4] and his view ultimately prevailed. It was settled in Henry VII.'s reign that the common law courts would, like the ecclesiastical courts, allow a right of retainer both to a sole executor and to co-executors. "Three things," said Fineux, C.J.,[5] "belong to the office of an executor. The first is to act honestly, the second to act diligently, the third to act faithfully. And to say that executors cannot retain the goods of the testator by their own act, because they shall not

[1] Lyndwood 181 sub voc. *Retinedum*, "Est enim regulare, quod pro debito naturali, ubi non datur actio, potest quis uti jure retentionis."

[2] Y.B. 20 Ed. III. (R.S.) ii 422; see also Y.B. 12 Hy. IV. Pasch. pl. 11; but in that case the ground upon which the right was placed was not that of Lyndwood and Willoughby, J.—"Home est tenu d'estre prochein a soy meme, *et hæc fuit opinion quorundam;*" but it is the view of Lyndwood and Willoughby which has prevailed, Plowden at p. 185; and possibly it is the adoption of their reasoning which causes it to extend to a debt barred by the Statute of Limitations. For modern views as to the origin of the right see Talbot v. Frere (1878) 9 C.D. at p. 374; Davidson v. Illidge (1884) 27 C.D. at p. 481.

[3] Y.BB. 12, 13 Ed. III. (R.S.) *per* Hillary and Shardelowe; 11 Hy. VI. Pasch. pl. 30 at p. 38 *per* Strange, who said that if the creditor were made sole executor he should refuse to administer; Y.B. 20 Hy. VII. Mich. pl. 14 *per* Rede.

[4] Y.B. 20 Ed. III. (R.S.) ii 420-422.

[5] Y.B. 20 Hy. VII. Mich. pl. 14.

be the judge of their own interest (is wrong); for it seems to me that if they do so honestly they may well be their own judges." To this all the judges agreed except Kingsmill. In spite of this decision, it was argued in 1558 that a creditor executor could not retain, but should refuse before the ordinary and so preserve his right to sue.[1] But the impolicy of this rule was exposed by the majority of the court, and the executor's privilege of retainer was finally established.[2]

(*b*) In the converse case, when a debt was due by the executor to the deceased, the law was substantially settled at the end of the fifteenth century. As early as Edward II.'s reign it would seem that opinion was tending towards the view that no action would lie for the debt.[3] But for some time it seems to have been uncertain whether, if the debt was due by one of several executors, the debtor executor could not be severed and action brought against him by the others.[4] It was, however, settled in Edward IV.'s reign that this could not be done.[5] The action was extinct; but in the interest of the other creditors, the debt was regarded as assets for payment of debts,[6] and, later, as assets for the payment of legacies if the testator had so directed.[7] This extinguishment of the right of action operated whether or not the executor proved the will, and whether or not he administered;[8] but it did not operate if he formally refused to become executor.[9] The appointment by the ordinary of a debtor to be administrator had no effect upon the debt because this was the act, not of the creditor, but of a third person—the ordinary.[10]

(ii) If we turn to the liabilities of the representatives we find that so long as they duly administered the estate a judgment against them could only be "de bonis testatoris." But a very slight amount of negligence, even a mistake in pleading, would be sufficient to render them liable to pay damages and costs out of

[1] Woodward v. Lord Darcy (1558) Plowden 184.

[2] Ibid at p. 185 seqq.

[3] Y.B. 4 Ed. II. (S.S.) (1310-1311) 150-153—it would seem from the report that the court did not regard the action as legally impossible, though in the end the plaintiff was non-suited.

[4] See Y.B. 12 Rich. II. 1-3.

[5] Y.B. 21 Ed. IV. Pasch. pl. 4 *per* Curiam; Woodward v. Lord Darcy (1558) Plowden 184; Wankford v. Wankford (1702) 1 Salk. 299.

[6] Y.B. 8 Ed. IV. Pasch. pl. 4 *per* Danby, Choke and Moyle; followed in Woodward v. Lord Darcy (1558) Plowden at p. 186; and by Holt, C.J., in Wankford v. Wankford (1702) 1 Salk. at p. 306.

[7] Flud v. Rumcey (1610) Yelv. 160.

[8] Y.BB. 20 Ed. IV. Hil. pl. 2; 21 Ed. IV. Pasch. pl. 4; Wankford v. Wankford (1702) 1 Salk. at p. 307.

[9] Wankford v. Wankford, loc. cit.

[10] Sir J. Nedham's Case (1611) 8 Co. Rep. at f. 136a.

their own estate; while more serious acts of commission, such as a wasting of the testator's assets or a conversion of them to their own use, rendered them liable to a judgment against them "de bonis propriis."[1] The strictness of these rules may be seen from the fact that it is only by virtue of a statute of the last century that an executor who pays legacies in good faith, and in excusable ignorance of merely contingent debts, escapes from personal liability.[2] In this period the strictness of these rules, coupled with the rigour and technicality of the prevailing system of procedure, worked great hardship, sometimes to creditors, and sometimes to the representative. As in other branches of the law, that system gave many opportunities to the unscrupulous. I will give two illustrations of the hardships which were sometimes occasioned to these two classes of persons. In 1343[3] a case is reported in which a debt was demanded against three executors. One appeared and pleaded and the others did not. The plea was found bad. Judgment was given as against all three de bonis testatoris. On an application for an execution de bonis propriis, the court said that such a judgment might be given against the one who had appeared and pleaded a false plea, but not against the others.[4] Pulteney (counsel for the plaintiff) pointed out[5] that such a decision gave unlimited opportunities for fraud. "If we cannot have execution in respect of their own goods great mischief follows: for, in that case, where a writ is brought against several executors, one who has nothing will appear by covin, and the others, who had assets of the goods of the deceased, and sold them, will absent themselves, and so execution will never be had." In 1456[6] it was proposed to make executors personally liable because they had pleaded "not the deed of their testator," when in fact the deed was the deed of their testator. It was pointed out that if this was law no executor would dispute a liability, and the property of testators might be wasted in paying debts upon forged deeds. Fortescue C.J., did not attempt to defend the rule—indeed, he repeats and approves of the arguments against it, saying that no

[1] See e.g. Y.B. 34 Hy. VI. Mich. pl. 42 at p. 22 *per* Prisot; Woodward v. Chichester (1560) Dyer 185b; cp. Goffin 52, 53 and cases there cited.

[2] 22, 23 Victoria c. 35 § 29; cp. Williams, Executors (9th ed.) 1206.

[3] Y.B. 17, 18 Ed. III. (R.S.) 6-12; the result of the case was peculiar; the hardship of the judgment was so manifest that *Stonore*, C.J., after discussion with the council, directed the parties to apply to the Chancery for a *non obstante* writ ordering the court to effect execution personally against the other two executors—which was done, as appears by the note from the record; for another instance of an equitable decision see Eyre of Kent (S.S.) ii xvi.

[4] See Anon. (1562) Dyer 210a.

[5] At p. 8. Note that later one executor might have had a remedy against a coexecutor by deceit on the case if the latter had fraudulently admitted a cause of action against both, Y.B. 9 Ed. IV. Trin. pl. 6 *per* Littleton.

[6] Y.B. 34 Hy. VI. Mich. pl. 42.

one would lay it down now for the first time; but he held that the established practice was too well settled to overrule.[1]

The weak point of these common law rules lay in the fact that the mode in which they were evolved prevented the court from taking any extended view of the administration of the estate as a whole. As we have seen, the procedure of the common law courts was designed to try actions between plaintiffs and defendants:[2] it was not designed for administrative work. The application of rigid rules to the representative at the suit of a particular creditor of the estate was bound to work injustice both to the representative and to the other creditors. Though these rules secured a considerable freedom of action to the representative in the exercise of his powers, they made his liabilities extremely onerous if he was an honest man, and extremely easy to evade if he was inclined to play the part of the unjust steward.

(2) *In the ecclesiastical courts.*

In this period the machinery of the ecclesiastical courts afforded some remedy for the defect which has just been noticed in the common law rules. Some of the rules applied by the ecclesiastical courts may have influenced the rules which in later days were evolved by the court of Chancery for the administration of estates, and may, from this point of view, have had a permanent influence upon the fabric of English law. But many of them became obsolete or were forgotten—sometimes to be revived as new ideas[3]—when the court of Chancery annexed this new sphere of influence. I shall not, therefore, treat of these rules at any great length. I shall only illustrate the manner in which they were in this period a useful and a necessary supplement to the rules of the common law.

The ecclesiastical courts kept the whole administration of the estate under their eye from the probate of the will or the grant of letters of administration. They compelled the representative to produce an inventory[4] by treating him much as the common law courts treated the executor de son tort;[5] and in a suitable

[1] At p. 24, "Si cest jugement fuit or premierement etre a juge, jeo entends que nul juge or voille ajuger que le pleintiff recovera des biens l'executor propres, etc., mes pur ce que tants des jugements ont ete dones en cel cas, pur ce que la ley est or issint, etc., et l'usage fait ley sans auter raison."

[2] Vol. i 458-459, 637.

[3] E.g. in the thirteenth century Archbishop Peckham issued something like an advertisement for creditors; if they did not appear within a certain period and could not assign a cause for their delay they went unpaid, P. and M. ii 341; it was not till the statute of 1860 (above 590 n. 2) that this idea was adopted; for another instance see above 584 n. 1.

[4] Lyndwood 176 sub voc. *Inventarium.*

[5] Ibid 176 sub voc. *Prius;* above 571-572; see Chichele's Constitution of 1416, Wilkins, Concilia iii 377.

case they could compel him to give security.[1] For the conduct of the administration they laid down rules not unlike some of those which the court of Chancery laid down in later days for the conduct of trustees. Though it may be that the executor, if not regarded by the testator as simply a hand to distribute his goods, was entitled to undisposed-of residue, he would hardly have been safe in appropriating it without the sanction of the ordinary.[2] On the other hand, if the executor was merely an executor, and the testator had left him nothing for his trouble and expenses, the ordinary might allow him something from the goods of the deceased.[3] Strict rules were laid down as to the conditions under which the executor might purchase his testator's goods.[4] The representative need not take up office unless he chose; but once having taken it up he could not retire as he pleased;[5] and the ordinary always reserved power to remove a representative whose conduct was unsatisfactory.[6] But though the ordinary tried to safeguard the estate by treating the representative as a trustee, he was careful also to preserve intact his powers. It was admitted that it was not the ordinary who administered the estate, but the representative; and the ecclesiastical law followed the common law in allowing him great freedom in the mode in which he executed any discretionary powers entrusted to him.[7] In the same way the ecclesiastical law followed and seconded the common law in giving the representative facilities for collecting the estate so far as was necessary for carrying out the wishes of the deceased,[8] and in holding all the representatives liable in solidum for acts

[1] Chichele's Constitution of 1416, Wilkins, Concilia iii 377; Lyndwood 170 sub voc. *Sufficienter Cavere.*

[2] Lyndwood 179 sub voc. *Propriis suis bonis*, "Quæro quid si testator plura bona legavit, sed legatarii repudiant legata, vel ante testatorem mortui sunt; an illa bona possit sibi Executor applicare? Dic, quod si Executor sit nudus minister, ita quod nullum commodum est habiturus, tunc non potest aliquid tale sibi applicare; secus si non sit minister nudus. . . . Præmissa intelligo vera, ubi testator de partibus deficientium nihil disponit, et fecit sibi Executores universorum bonorum; nam tales loco hæredum sunt, et lucrantur illla quæ nec in specie nec in genere per testatorem disposita sunt . . . tamen bene faciet talis Executor si consilio Ordinarii talia disponat."

[3] Ibid 178 sub voc. *Labore.*

[4] Ibid 178 sub voc. *Titulo Emptionis;* see ibid 180, 181 for Archbishop Stratford's constitution denouncing penalties against those who appropriated the property of the deceased.

[5] John of Ayton 108.

[6] Lyndwood 177 sub voc. *Nisi Talibus;* P. and M. ii 341.

[7] Lyndwood 179 sub voc. *Libere*, "Possunt Executores libere administrare dum tamen bona fide id faciant;" after discussing the question whether, if the testator leaves money to redress injuries, the executor may spend it for this purpose as he sees fit without the bishop's interference, he concludes, "Ego autem puto, quod quoad regnum istud hæc constitutio sufficit ad excludendum Episcopum, una cum consuetudine in hac parte diutius observata, quæ talia relinquunt depositioni Executorum."

[8] Ibid 175 sub voc. *Effectum;* see also ibid 171, 179.

done in their representative capacity.[1] Finally, at the close of the administration, the ordinary compelled the representative to account.[2] Though the testator or the ordinary could dispense with the inventory,[3] neither could dispense with the liability to account.[4]

We can see from the extant accounts and inventories that the rules of the ordinary were a considerable safeguard. The following illustration will show the manner in which the inventory and the accounts of the administration of the estate of a canon of York were drawn up in 1452.[5] The inventory contained the following totals, each made up of a large number of items: Actual cash in the house, £120 2s. 4d., and one broken noble; silver gilt plate, £44 16s. 10d.; silver plate £302 5s. 11d.; jewels and plate for the chapel, £12 12s. 4½d.; personal ornaments (including three pairs of silver-mounted spectacles), 54s. 8d.; books in the study and chapel, £46 16s. 0d.; canonical vestments, £4 17s. 0d.; furniture, etc., in the hall at York, £7 5s. 4d., in the principal bedchamber at York, 47s. 1d., in the second bedchamber at York, 39s. 10d., in the third bedchamber at York, 30s. 6d.; bedding at York, 43s. 8d.; contents of the wardrobe, at York, £11 18s. 8d.; ornaments of the chapel at York, 102s. 10d.; contents of chamber under the wardrobe at York, 12s. 6d.; contents of the pantry at York, £4 13s. 10d., of the buttery, 12s. 6d., of the kitchen, £6 9s. 5d., of the brewery, 110s. 10d., of the bakehouse, 6s. 5d., and of the stable, £13 11s. 2d.; gravel sold, 9s. There were similar inventories of the testator's belongings at Beverley and Cawood; and, in addition, an account of the debts due to the testator at different places. Those which were regarded as bad were separately listed. The amount due to him from his canonry for the year after his death is noted; and the whole estate is valued £1,317 18s. 1d., plus the one broken noble. The accounts are no less elaborate. They are grouped in their separate items under the following heads: Debts due by the deceased, £55 13s. 7d.; funeral expenses, £90 13s. 4½d.; payments for obits, £36 4s. 5d.; costs of probate, 53s. 9d.; legacies, £308 9s. 11½d.; mortuary fees, 72s. 8d.; salaries of chaplains (who said masses for the soul of the deceased), £14 18s. 4d.; household expenses after the death of the testator, £20 14s. 7½d.; servants' wages, £9 2s. 0d.; settling amounts due for dilapidations in the

[1] John of Ayton 108.

[2] Lyndwood 180 sub voc. *Sibi;* Chichele's Constitution of 1416, Wilkins, Concilia, iii 377.

[3] Lyndwood 176 sub voc. *Inventarium.*

[4] John of Ayton 109; Lyndwood 183 sub voc. *Fideliter;* for an instance of such attempted dispensation by a testator see Test. Ebor. i 178 (1392).

[5] Ibid iii 129-152.

testator's various livings, including the executor's costs in London (71s. 6d.), £201 8s. 2d.; memorial gifts to relations, friends, and servants of the deceased, £18 3s. 11½d.; necessary payments in the conduct of the administration, £12 10s. 11½d.; counsel's fees, 24s. 4d.; spent in charity, £265 0s. 11d.; the daily expenses of the executors, including the costs of writs and money paid to others, £22 2s. 1d.;[1] amounts released or not recovered from debtors, £80 13s. 4d.; bad debts other than those enumerated, £155 10s. 10d.; the sum total of the whole amount spent was £1,308 17s. 4d., plus one or two items, including two allowances made by the executors and a claim against the deceased, which were added in a postscript.

I have given the heads of this inventory and account at some length because it shows that, in the diocese of York at least, the ordinary did exercise a very careful supervision over the conduct of the representative. The minuteness of the account could not be surpassed; and I cannot doubt that the estate was quite as thoroughly and considerably more quickly administered than it would have been in the court of Chancery in the eighteenth century. But bad days were in store for the ecclesiastical courts. The common law courts made it almost impossible for them to act at all. They would not allow them to enquire into the truth of the inventory,[2] or to examine the executor's accounts;[3] and they issued writs of prohibition against actions on the bonds taken to secure the production of a proper account.[4] It is not surprising that their consequent decline in power, coupled with the narrow severity of the common law rules, enabled dishonest executors to commit such frauds that Perkins actually advised testators to give their property away in their lifetime rather than leave it by way of legacy,[5] and that the administrator became in practice the intestate successor to the deceased.[6] A court was wanted with power to survey the whole conduct of the administration, and to restrain those who made an unconscientious use of the narrow rules of the common law. This want was eventually supplied by the court of Chancery; and even in this period litigants were beginning to appeal to it.[7] When, in the following period, it had

[1] In this account (p. 151) there is an early mention of solicitors, "Una cum feodis et regardis datis attornatis, solicitariis, et consiliariis executorum;" for the history of solicitors and the manner in which they became a definite order in the legal profession see Bk. iv Pt. I. c. 8.

[2] Spence, Equitable Jurisdiction i 579. [3] Ibid.

[4] Hughes v. Hughes (1666) Carter 125; above 558.

[5] Above 556-557. [6] Above 558.

[7] Above 583; see also Vavasour v. Chadworth (Ed. IV.) Cal. (R.C.) i xciii; Select Cases in Chancery (S.S.) 100-101 (1410-1412), 107-108 (1407-1409), 143-150 (1456); Y.B. 4 Hy. VII. Hil. pl. 8, where the Chancellor gave an equitable remedy in a case where there was no remedy at law.

not only defeated the attempt of the common law courts to cripple its jurisdiction, but had even asserted its superiority to those courts by making good its claims to issue injunctions to stop proceedings at common law,[1] its control over all questions connected with the administration of the estates of deceased persons was assured.[2] It is for this reason that we must look to the rules of equity for our present law on this subject.

[1] Vol. i 461-465.
[2] Ibid 629-630; Bk. iv. Pt. I. cc. 4 and 8.

CHAPTER VI

PROCEDURE AND PLEADING

THAT rules of procedure and pleading exercise both a predominating and a permanent influence upon the shape taken by the substantive rules of law in those legal systems which have had a continuous history is a well ascertained fact of legal development; and the history which I have just related has furnished many illustrations of its truth. But in this chapter I am concerned, not with these larger and more general influences exercised by this branch of the law, but with the evolution of the rules themselves. We have seen that in the preceding period certain primitive rules of procedure and pleading had been evolved.[1] But in this branch of the law, the new methods of royal justice, and the new ideas which came with the legal renaissance of the twelfth and thirteenth centuries, exercised a more decisive and a more revolutionary influence than in any other. In the criminal law the new process of presentment and indictment; in the civil law the system of royal writs, the growth in the complexity of the rules of process, and the great elaboration of the rules of pleading which necessarily followed from the permission to litigants to use many various "exceptions" and "replications;" in both the criminal and the civil law the spread of trial by jury—all combined to recast the system of procedure and pleading into more elaborate and sometimes more rational forms. Some of the more primitive rules, it is true, survived, and continued, right down to the nineteenth century, to exist side by side with the new rules which had come to regulate the conduct and machinery of trials and actions; for the ideas on which they rested still permeated men's minds in this mediæval period; and the cessation of the influence of Roman law at the end of the thirteenth century, and the growth of a crabbed technical habit of mind in the common lawyers of the succeeding centuries, made for their permanence long after they had lost their meaning. They had become part of a fixed system which, in an age of absolutely unscrupulous litigation, was as quick to grow in detail and intricacy as it was slow to discard any of the rules which it had inherited from a remote past. Thus, owing to this mixture

[1] Vol. ii 102-117.

of new and old ideas, owing to the training of the common lawyers, and owing to the litigiousness of the age, the rules of procedure and pleading tended, all though this period, to become more and more irrational. No part of the common law was in more urgent need of reform; and we shall see that in the following period it was in some respects reformed partly by the legislature, but chiefly by the judges, whose intelligence had been quickened by the need to compete with rival courts. But, as is the case with many other branches of English law, this reform was gradual and piece-meal. It proceeded rather by way of developing certain tendencies and rules, rather by way of adapting certain new ideas as to the conduct of litigation civil and criminal to the older scheme, than by way of large and far reaching changes. For this reason the main outstanding principles and features which had begun to characterize this branch of the law in this mediæval period remained, and continued to characterize it right down to modern times. In this branch of the common law, therefore, this mediæval period is quite as important as it is in many another branch, because to it we must look for some of the most salient and permanent features of our modern system of common law procedure. In this, as in other branches of the common law, the combination of the new rules and ideas of the royal courts with the substratum of primitive custom produced a system which was quite unique.

This combination of the new ideas which came with the spread of royal justice with the older ideas of the customary law, produced different effects in the criminal and civil law. The new system of criminal procedure, resting upon the presentment of a grand jury indictment and trial by petty jury, differed from the new system of civil procedure resting upon the original writ, process upon that writ, and the settlement by the pleadings of the parties of the question whether the point in dispute was an issue of law triable by the court, or an issue of fact triable by a jury. Therefore I shall deal separately with the criminal and the civil law; and under each head I shall consider, firstly, the history of what was perhaps in primitive times the most important of all the topics in the law of procedure—the topic of process; and, secondly, the history of procedure in general and pleading.

§ 1. The Criminal Law

Process

Under this head I propose to deal with the machinery provided by the common law for securing the appearance of a person suspected of or charged with a crime. I shall deal with the history of this subject under the three following heads: (1) the arrest of

persons not yet indicted; (2) the arrest of persons who have been indicted; and (3) process against persons who seek to evade arrest.

(1) *The arrest of persons not yet indicted.*

The legal machinery provided for this purpose has passed through several distinct phases, all of which have left their traces upon our modern law. There is first of all the primitive period, covering roughly the twelfth, thirteenth, and early fourteenth centuries, in which the law relied on the action of the vill or township, or on the machinery of the frankpledge, or on the responsibility of a man for those in his mainpast. Secondly, there is the period, covering roughly the fourteenth, fifteenth, and early sixteenth centuries, when these older institutions were decaying, and when the law was coming to rely rather on the action of the individual citizen, or on the action of officials, such as the sheriff, the coroner, the justices of the peace, and the constables. Thirdly, there is the period covering roughly the latter part of the sixteenth century onwards, when more reliance was being placed upon official action, and somewhat larger powers were being given to officials than were possessed by ordinary citizens.

(i) In the thirteenth century, and throughout the mediæval period, vills might be made liable for failure to arrest those who had committed homicide, or for failure to secure such persons if they had been arrested and escaped; and, if the vill could not pay, the hundred was liable. Similarly the tithing or the lord was liable if they or he failed to secure a member of the tithing or a person in his mainpast who had committed homicide.[1] But all this primitive organization was going out of use in the fourteenth century. Probably the disuse of the General Eyre had something to do with it, as it was in the Eyre that these communal duties were brought home to communities and tithings by the process of amercement.[2] But no doubt the main reason for its disuse was its cumbersome character.[3] Though Hale laments the disuse of the frankpledge system, and the disappearance of the rules which made the lord liable for the doings of those in his mainpast,[4] they were in fact becoming unworkable owing to the changes which were taking place in the political, the social, and the economic ordering of the state. But these old rules left one permanent legacy. They presupposed the principle that all the members of

[1] Hale, P.C. ii 73-75; vol. i 13-15, 27, 76-82, 134-137; cp. above 371.
[2] Vol. i 272. [3] Ibid 80-81, 136, 272 n. 3.
[4] "This law of amercing the *decenna* or him of whose family an offender is, is not abrogated, but yet it is not now used; but it was certainly a most excellent constitution, whereby every man was under the pledge of his master or father, with whom he lived, or must be within some *decenna*, that may see him forthcoming," P.C. ii 75.

the vill or tithing must actively assist to arrest criminals;[1] and this rule was strengthened and emphasized by the common law and statutory rules which made it the legal duty of all men to pursue criminals when the hue and cry had been raised.[2] Hence when these old rules and institutions decayed, the law came to rely mainly on the rules which made it the legal duty of all citizens, and especially of all officials, to be active in the arrest of criminals.

(ii) In the thirteenth century the duties of the ordinary citizen in the matter of the arrest of criminals were not very precisely defined. "The main rule," says Maitland,[3] "we think to be this, that felons ought to be summarily arrested and put in gaol. All true men ought to take part in this work and are punishable if they neglect it. We may strongly suspect, however, that in general the only persons whom it is safe to arrest are felons, and that one leaves oneself open to an action, or even an appeal of false imprisonment if one takes as a felon a man who has done no felony. . . . The ordinary man seems to have been expected to be very active in the pursuit of malefactors, and yet to act at his peril." On the other hand, the sheriff and other officers probably had larger powers to arrest suspected felons;[4] and it would seem that even the ordinary man could and indeed was bound to arrest on suspicion when the hue and cry had been raised. This was probably the law in the earlier half of the fourteenth century,[5] and was certainly the law of the fifteenth century.[6] "And, therefore," as Hale says,[7] "the justification of an imprisonment of a person upon suspicion, and of a person, especially a constable, upon *hue* and *cry* levied do extremely differ, for in the former there must be a felony averred to be done, and it is issuable; but in the latter, viz. upon *hue* and *cry* it need not be averred, but the *hue* and *cry* levied upon information of a felony is sufficient, though perchance the information was false." In these rules we may perhaps see the remote origins of the rule which gives a constable larger powers of arrest than the private citizen.[8]

All through the mediæval period the vague rules with which the law started were being reduced to greater precision—very

[1] P.C. ii 75.

[2] Vol. i 68; Hale, P.C. ii 98-100, and references there cited.

[3] P. and M. ii 580-581.

[4] Ibid 581.

[5] Y.B. 7 Ed. III. Pasch. pl. 15.

[6] Y.BB. 5 Hy. VII. Mich. pl. 10 (p. 5) where Brian, C.J., attributes this effect of raising the hue and cry to the Statute of Westminster I. c. 9 and the Statute of Winchester; 21 Hy. VII. Trin. pl. 5 (p. 28) where Rede, J., says, "ou on justifie la prisel dun home pur suspicion de felony, il covient qu'il ait bon cause de suspicion . . . comme *hue and cry*, c'est bon cause; et si le *cry* soit fait sur rien, donque cestuy que ce leva sera puni."

[7] P.C. ii 101.

[8] Below 603-604.

largely through the medium of proceedings for false imprisonment brought by persons arrested against their captors. In the first place, it was agreed that if a man knew that a felony had been committed,[1] or even if he knew that a trespass had been committed which might lead to a felony,[2] he not only could, but was bound to arrest; and in such a case if he killed a felon who resisted the homicide was justifiable.[3] In the second place, if a party suspected that a felony had been committed, though he was not bound to arrest,[4] he could lawfully arrest if he had good grounds for his suspicion;[5] but he could not justify the breaking open of doors to effect the arrest unless it turned out that the person arrested had in fact committed felony.[6] The fact that the hue and cry had been raised was always a good cause for suspicion;[7] but, unless a felony had in fact been committed, common report was not a sufficient justification;[8] and in such a case the mere fact that the arrest was made by the command of an official was no justification, as the official himself was not justified in arresting in such a case.[9]

It would seem from this last rule that in the Middle Ages the powers of officials to arrest suspected persons were not very much greater than those of private citizens.[10] It is true that the constable had by statute or common law certain powers to arrest on suspicion, or to prevent breaches of the peace, or to stop immoral conduct, which private citizens had not got.[11] But in other respects his powers were very much the same as those of an ordinary citizen. Brian, C.J., and Haugh, J., held that if A suspected B of having committed a felony, and asked a constable to help him to arrest B, and the constable did so, the constable acted unlawfully, because he himself did not suspect B.[12] Townsend, J., differed from Brian, and Keble and Vavisour were of his opinion; and their opinion prevailed.[13] But it was only if the constable on A's information suspected B, and A was present at the arrest, that the arrest was

[1] Y.B. 10 Ed. IV. Mich. pl. 20.

[2] 22 Ass. pl. 56; cp. 7 Ed. III. Pasch. pl. 15; Hale, P.C. ii 77.

[3] 22 Ass. pl. 55.

[4] "Nul est lye per le Ley arrester auter, sinon que il veist le cause loial," Y.B. 2 Hy. VII. Pasch. pl. 1 (p. 16) *per* Brian, C.J.; cp. Hale, P.C. ii 82.

[5] Y.BB. 11 Ed. IV. Trin. pl. 8 *per* Choke, J., and Brian, C.J.; 5 Hy. VII. Mich. pl. 10.

[6] Hale, P.C. ii 82; see Y.B. 13 Ed. IV. Pasch. pl. 4 (p. 9) *per* Choke, J.

[7] Y.BB. cited n. 5.

[8] Y.B. 5 Hy. VII. Mich. pl. 10 at p. 5; and *per* Brian, C.J., a common report in the county where the felony was committed might not be a good cause for suspicion which would justify an arrest in another county, Y.B. 11 Ed. IV. Trin. pl. 8—a captious distinction which made for the inefficiency of the law.

[9] Y.BB. 11 Ed. IV. Trin. pl. 8 *per* Piggot; 2 Hy. VII. Pasch. pl. 1 (p. 16) *per* Brian, C.J.; 5 Hy. VII. Mich. pl. 10.

[10] "Jeo di que nul poit arrester, l'officier le Roy ne auter, pur suspicion de felony, sinon ceux qui ont le suspicion," Y.B. 2 Hy. VII. Pasch. pl. 1 (p. 16) *per* Brian, C.J.

[11] Hale, P.C. ii 88-90, and the authorities there cited.

[12] Above n. 10.

[13] Hale, P.C. ii 91-92.

legal.[1] It would seem, however, that, at the beginning of the sixteenth century, the courts were beginning to think that the powers of officials ought to be somewhat more liberally construed. In 1499[2] it was strenuously argued that when the servants of a justice of the peace pleaded, in answer to an action for false imprisonment, that the justice came to quell a riot, and that, with this object, he had ordered his servants to arrest certain persons, and that this was the imprisonment complained of, the justification was bad. The justice, it was said, could only order an arrest by written precepts which the officer effecting the arrest must show to the person arrested. But the court, Fineux, C.J., and Rede and Tremaine, JJ., rejected this view of the law, and held that a justice of the peace could verbally command an arrest to be made in such a case, though it was admitted that the law was otherwise if the riot was not in the view of the justice.

But it is clear that all through the sixteenth century the question of the powers of officials to effect arrests was very doubtful. In 1523 the court was clear that a justice of the peace could not issue a warrant for the arrest of a criminal who was not indicted, unless he himself suspected him; and it was doubtful whether the bailiff who acted on such a warrant escaped liability.[3] In 1612 in *Sir Anthony Ashley's Case*[4] and in his Fourth Institute[5] Coke in substance repeated the mediæval law. It is only if a felony be actually committed that an arrest can be made on suspicion, and then only by the party who suspects. It follows, therefore, that a command to arrest given to a person who does not suspect will not justify an arrest by the latter. It follows further that a warrant to arrest issued on the application of a person who suspects by a justice of the peace who does not himself suspect, is invalid. Though, historically, it is probable that Coke's law was right, it was not in harmony either with the new ideas as to the powers and duties of magistrates, or with the new machinery for the keeping of the peace, which were arising in the sixteenth and seventeenth centuries.[6] Hence, in the latter half of the seventeenth century, the law begins to emphasize the distinction between the powers of officials and the powers of private citizens, and to give larger powers to officials.

(iii) By the latter part of the sixteenth century the conduct of the local government of the country had definitely passed from the old communities of township, hundred, and shire, to the justices of the peace assisted by the sheriffs, coroners, and constables.[7] We

[1] Hale, P.C. ii 91-92.
[2] Y.B. 14 Hy. VII. Mich. pl. 19.
[3] Y.B. 14 Hy. VIII. Hil. pl. 3.
[4] 12 Co. Rep. at p. 92.
[5] At p. 177; vol. i 294-295.
[6] See Hale, P.C. ii 107-110, cited vol. i 295.
[7] Vol. i 288; Bk. iv Pt. I. c. 1,

have seen that statutes of Philip and Mary's reign had enlarged the powers of the justices of the peace to arrest and examine persons charged with felony; and that the justices were beginning to make a practice of issuing warrants to arrest persons suspected by others.[1] We have seen, too, that, though this practice was contrary to the old law and was disapproved by Coke, it was defended by Hale, and came to be regarded as perfectly legal at the end of the seventeenth century.[2] Similarly, it is quite clear from Hale that the powers of constables and other officers entrusted with the conservation of the peace was growing. Coke laid it down that if ministers of justice were killed in the execution of their office, even though they were acting under process which was erroneous,[3] their killing was murder. They were the king's ministers, and "reason requires that this killing and slaying shall be an offence in the highest degree."[4] Hale emphasized their powers; and, though he does not, and could not, deny the rules established by the older authorities as to the powers of private persons to arrest, he is inclined to contrast the powers of officials with those of the private person, and to insist upon the greater responsibility of the former for the conservation of the peace, and the greater protection which the law gave them. "These," he says,[5] "are under a greater protection of the law in execution of this part of their office upon these two accounts: 1. Because they are persons more eminently trusted by the law, as in many other acts incident to their office, so in this. 2. Because that they are by law punishable, if they neglect their duty in it. . . . And hence it is, that these officers, that are thus intrusted, may without any other warrant but from themselves arrest felons, and those that are probably suspected of felonies; and if they be assaulted and killed in the execution of their office it is murder; and on the other side, if persons that are pursued by these officers for felony or the just suspicion thereof, nay for breach of the peace or just suspicion thereof, as night-walkers, persons unduly armed, shall not yield themselves to these officers, but shall either resist or fly before they are apprehended, or being apprehended shall rescue themselves and resist or fly, so that they cannot be otherwise apprehended, and are upon necessity slain therein, because they cannot be otherwise taken, it is no felony in these officers or their assistants, that upon inevitable necessity kill them, though possibly

[1] Vol. i 294-296. [2] Ibid.

[3] E.g. if a capias issued instead of a distringas, Hale, P.C. i 457; but if the process were defective, or issued without jurisdiction, or unlawful force were used, the killing would be manslaughter, see Hale, P.C. i 458; Foster, Crown Law 312.

[4] Mackalley's Case (1612) 9 Co. Rep. at f. 68b; cf. Young's Case (1585) 4 Co. Rep. at ff. 40b, 41a.

[5] P.C. ii 85-86.

the parties killed are innocent, for by their resistance against the authority of the king in his officers they draw their own blood upon themselves."

It is in this changed view of the powers of officials to arrest that we can see the origin of the modern rules that, whereas a private person may only arrest for felony or suspicion of felony, a constable may arrest anyone who in his presence commits a mere breach of the peace; and whereas a private person can only arrest on suspicion if the felony has actually taken place, the constable can arrest on suspicion whether it has taken place or not.[1] It is probable that rules expressed in this form would not have been recognized in the Middle Ages. There was, it is true, just sufficient authority in the older cases to justify the rule that a constable could arrest in other cases besides cases when a felony had been committed or was suspected.[2] On the other hand, there was little or no authority to justify the rule that a constable who arrested on suspicion was protected, even though no felony had actually been committed.[3] But I think that it is probable that the modern rule was arrived at partly by a generalization from the older statutes which gave extended powers to sheriffs, bailiffs, and others;[4] but chiefly by a new application of the rules as to what could be done when the hue and cry was raised. We have seen that if the hue and cry had been raised, an arrest on suspicion was justifiable, whether the crime had been committed or not.[5] Now we shall see that in the seventeenth century it was the constables of the townships and hundreds who in effect exercised the powers formerly entrusted to these communities.[6] They, therefore, as Hale's statement cited above shows,[7] were the persons whose special duty it was to raise the hue and cry; and, if they raised the hue and cry, an arrest on suspicion, even though no crime had been committed, was justifiable according to the older authorities. We shall see that they were generally the appointees of the justices, and acted on their instructions.[8] Thus a hue and cry was generally raised by them in pursuance of a justice's warrant—so generally that the phrase "to grant a hue and cry" was used to signify the issue of a warrant.[9] It can easily be seen therefore that a constable to whom a "hue and cry had been granted" had the power to arrest whether or not a crime had been committed.[10] When the origin

[1] Kenny, Criminal Law 444-445.
[2] Above 599-600.
[3] Above 601.
[4] See Hale, P.C. ii 87, citing Stat. West. I. c. 9.
[5] Above 599.
[6] Bk. iv Pt. I. c. 1.
[7] Above 599.
[8] Bk. iv Pt. I. c. 1.
[9] Vol. i 295.
[10] Note that Kenny, Criminal Law 441 n. 4, points out that the raising of the hue and cry "gave the same powers of arrest to all taking part in it as a written warrant now-a-days would."

of his power so to arrest had dropped out of sight, it was inevitable that this power should be supposed to be inherent in his office. As we shall now see the attainment of this result was assisted by some of the rules which governed the arrest of persons who had been indicted.

(2) *The arrest of persons who have been indicted.*

From the earliest time it was the duty of the sheriff and other officials entrusted with the conservation of the peace to arrest those who had been indicted.[1] It was the duty of all to help in the arrest if called upon, so that those who acted under these instructions were protected. In Edward III.'s reign Thorpe, J., ruled that the killing of a person indicted, who was forcibly resisting arrest by one who had a sheriff's warrant for his arrest, was a case of justifiable homicide.[2] A person indicted for homicide under these circumstances, he said, needed no pardon, but was entitled to be acquitted.[3] This power of the sheriffs and other officers to arrest a person indicted, and the immunity from liability of those who killed such a person when he could not otherwise be taken, were recognized as good law by Coke,[4] and are part of our modern law.[5] It should be observed also that Coke, when laying down this rule, takes occasion to note that the act of the sheriff who arrests under a writ of capias, unlike the act of a private person who has no special warrant, is justifiable, though no felony had been committed.[6] When in the seventeenth century arrests were usually effected by constables acting under a justice's warrant this principle was easily extended to them.[7]

(3) *Process against persons who seek to evade arrest.*

From very early times persons appealed or indicted of treason or felony could be outlawed if they evaded capture and refused to surrender.[8] A person thus appealed or indicted must be exacted, i.e. asked for or demanded, in five successive county courts.[9] At

[1] P. and M. ii 581. [2] 22 Ass. pl. 55.

[3] "Je vous dis bien quant home occist auter par garrant, il peut bien avower le fait, et nous luy acquittons nettement sans attender la grace le Roy per sa charter en ce cas."

[4] Third Instit. 56; and see Fourth Instit. 177; Hale, P.C. i 481.

[5] Kenny, Criminal Law 443.

[6] "There is a diversity between a warrant in deed and a warrant in law, in this, that if a man be indicated of murder, robbery, burglary, or other felony, and the sheriff by virtue of a *capias* offer to arrest him, and he resisteth and fly, the sheriff may kill him if otherwise he cannot arrest him, although in truth the party be not guilty, nor any felony done. But in the case of the above said warrant in law there must be a felony done," Third Instit. 221.

[7] Hale, P.C. ii 77, 91, 118. [8] Vol. ii 105.

[9] P. and M. ii 579—the number differs "for we may or may not count what happens at the first or what happens at the last court as an exaction," ibid n. 2; generally one writ of capias issued, and then the process of exacting began, 22 Ass. pl. 81; Y.BB. 1 Hy. VI. Pasch. pl. 8 (p. 6); 8 Hy. V. Hil. pl. 25.

the end of that time he was outlawed. The effect was that he was put outside the king's peace and protection,[1] and could probably till 1329,[2] be slain by anyone. His goods and chattels were forfeited when the first exigent (i.e. when direction to "exact" in pursuance of a writ of capias) was awarded,[3] and when he was finally outlawed, his land escheated.[4] If he was caught, he could be hung without trial.[5] We have seen that English law has always refused to try a man in his absence.[6] The survival of this primitive rule is probably due to the fact that in cases of treason or felony such a power was hardly necessary, for the law has always had the power to punish him in his absence by forfeiture, and to treat him as if he were condemned if he could he captured.

The weapon of outlawry was, as Maitland has said, "as clumsy as it was terrible."[7] Even in the thirteenth century there were many cases in which a person might be outlawed without ever having heard of the proceedings. "There was therefore great need for royal writs in-lawing an outlaw and many were issued; but no strict line could here be drawn between acts of justice and acts of grace."[8] Conversely, in later law, there were many cases in which the proceedings to outlaw a criminal might fail of effect by reason of small mistakes in the wording of the return of outlawry.

In Hale's day there was much law on both these points. Let us take the second point first. The absolute verbal accuracy required in the return of an outlawry was only paralleled by the verbal accuracy required in an indictment.[9] Thus, "if the day and year of the king be inserted in the 1, 2, 3 and 5 exactus, but omitted in the 4th exactus, it is erroneous."[10]

The cases in which the outlaw could get his outlawry reversed by writ of error had become fairly well settled by the seventeenth century. The person outlawed could show that he was not the person intended to be outlawed, but someone else of the same name;[11] or that he was under fourteen years of age;[12] or that he was imprisoned or beyond the sea at the time of his outlawry.[13]

[1] P. and M. ii 447.

[2] "In the beginning of the reign of King Ed. III. it was resolved by the judges, for avoiding of inhumanity, and of effusion of Christian blood, that it should not be lawful for any man, but the sheriff only (having lawful warrant therefore) to put to death any man outlawed though it were for felony, and if he did, he should undergo such punishment and pains of death as if he had killed any other man," Co. Litt. 128b, citing Y.B. 2 Ed. III. Hil. pl. 17 = Fitz., Ab. *Corone* pl. 148.

[3] Hale, P.C. ii 204, citing 41 Ass. 13.

[4] Above 69.

[5] Hale, P.C. ii 205.

[6] Vol. ii 105.

[7] P. and M. ii 579.

[8] Ibid ii 579-580.

[9] Below 617-618.

[10] Hale, P.C. ii 203.

[11] Ibid ii 207; there was a special writ—De Idemptitate Nominis—for this purpose, F.N.B. 268 B.

[12] Hale, P.C. ii 208.

[13] Ibid.

The last cause for reversal had given rise to a good many fine distinctions which Hale summarizes; and, owing to the statute of 1557-1558 which required two witnesses to substantiate a charge of treason,[1] it could be used to escape liability. It was possible that persons indicted for treason might go abroad, and, when they thought that the witnesses against them were dead or safely out of reach, they might return, and get their outlawries reversed on the ground that they had been beyond the seas when sentence of outlawry had been pronounced.[2] To obviate this danger it was enacted by the same statute of 1557-1558 that outlawries for treason should not be reversed on this ground, unless the person outlawed surrendered within a year to the chief justice of the king's bench. If he surrendered within the year he was allowed to traverse the indictment, and, if on his trial he were acquitted, his outlawry was discharged.[3] A very strict construction of this statute (which was disapproved by Parliament after the Revolution[4] and not followed)[5] was put upon this statute in *Armstrong's Case* in 1684.[6] It was held that an outlaw who had been captured abroad and taken to England could not take any benefit from it because he could not be said to have surrendered.

Some of the defects of the process of outlawry were remedied in these ways; and, as thus improved, it became a process which is as important in the civil as in the criminal law. As early as Bracton's day it was being extended to trespass in a modified form—not involving sentence of death, but only a forfeiture of goods and chattels.[7] There was to be a major and a minor outlawry just as there was a major and a minor excommunication.[8] This extension of the process of outlawry to trespass was a principal cause both for the spread of this action, and for the extension of the process of outlawry to other personal actions.[9] The futility of the mesne process in many of the older civil actions real and personal made both for the decay of the real actions, and the ex-

[1] 5, 6 Edward VI. c. 11 § 9.
[2] See Hawle's remarks on Armstrong's Case 10 S.T. 123.
[3] 5, 6 Edward VI. c. 11 § 5. [4] 10 S.T. 116-119.
[5] R. v. Johnson (1729) Foster, Crown Law 46.
[6] 10 S.T. 105.
[7] "Quia nullum majus crimen quam contemptus et inobedientia . . . et cum vocati vel summoniti per regem venire contempserint, faciunt se ipsos exleges, et ideo utlagari deberent, non tamen ad mortuum vel membrorum truncationem, si postea redierint vel intercepti fuerint cum causa utlagationis criminalis non existat, sed ad perpetuam prisonam vel regni abjurationem, et a communione omnium aliorum qui sunt ad pacem domini regis," Bracton f. 441a; for the later law see Co. Litt. 128b; Bl. Comm. iii 284.
[8] "Et sicut causa excommunicationis facit excommunicationem minorem et pœnam, ita causa utlagationis facit utlagationem esse minorem et pœnam. . . . Excommunicatio enim et utlagatio in multis ad paria judicantur," Bracton f. 441a.
[9] Below 626-627.

tension of outlawry to some of the older personal actions. We shall better appreciate the reasons why outlawry was thus extended beyond the sphere of the criminal law when we have examined the nature of the mesne process in these civil actions.[1] But before I can deal with this topic I must give some account of the history of procedure and pleading in criminal cases.

Procedure and Pleading

We have seen that in the period before the Norman Conquest there was no true criminal procedure;[2] but that, in the course of the two centuries which succeeded the Conquest, the adaptation of the jury system to the repression of crime produced such a procedure.[3] From the end of the thirteenth century onwards the normal course of the procedure in a criminal case has been presentment by the grand jury, indictment, and trial by the petty jury. It would not of course be true to say that it is the only procedure known to be law. Long after the new procedure was established the summary procedure against a criminal caught in the act,[4] and the old criminal procedure of the appeal lived on.[5] In the fourteenth century the Parliamentary impeachment arose;[6] and in the sixteenth century the summary jurisdiction of the justices of the peace,[7] and the procedure by way of information,[8] created new and different methods of procedure. For all that it is true to say that the procedure of presentment, indictment, and trial by petty jury became the normal method of procedure, and that, for this reason, it has had a principal share in forming the quite unique conception of a criminal trial which the common law has evolved.

In relating the mediæval history of this subject I shall, in the first place, say a few words about the older forms of criminal procedure which were being displaced by the procedure by way of indictment, and of certain exceptional forms which emerged during this period; in the second place, I shall speak of the normal procedure of indictment and trial by petty jury; and in the third place, I shall give some account of the manner in which the English conception of a criminal trial was beginning to differ from the continental conception.

(1) *The older and other exceptional forms of criminal procedure.*

(i) The two older forms of criminal procedure were (*a*) the summary process against the criminal who was caught with the

[1] Below 624-625.
[2] Vol. ii 108-110.
[3] Ibid 198-199, 257, 360.
[4] Ibid 102, 258; below 608.
[5] Vol. ii 361-364.
[6] Vol. i 379-381.
[7] Ibid 293.
[8] Bk. iv. Pt. II. c. 7 § 2.

mainour, i.e. with the stolen goods or other evidence of his guilt upon him; and (*b*) the procedure by way of appeal.

(*a*) Of the procedure followed in the case where a criminal was taken with the mainour I have already spoken.[1] We have seen that in such a case he could, without more ado, be arraigned, condemned, and executed without being allowed to say a word in his defence; and that, in the thirteenth century, this summary procedure was "ridding England of more malefactors than the king's courts can hang."[2] As late as the beginning of the fourteenth century it was held that a person taken with the mainour or other apparent evidence of guilt upon him could be put on his trial without any preliminary presentment or indictment.[3] But it would seem that the older procedure was being modified, as the criminal would be tried by a jury, and would therefore, presumably, be allowed to defend himself.[4] Even this modified form of the old procedure fell out of use in the common law courts later in the fourteenth century. Hale supposes[5] that it became legally impossible as the result of the statutes of Edward III.'s reign, which in effect enacted that persons should not be imprisoned unless on an indictment or on presentment, or without being put to answer by due process of law.[6] This may well have been the effect attributed to those statutes by the courts, as they were probably ready to discountenance so barbaric a procedure. But it may be doubted whether this construction was correct. The statutes were passed primarily to restrict the encroachments of the jurisdiction of the council;[7] and, as a matter of history, this barbaric procedure was as much a part of the due process of the common law as the normal procedure of presentment and indictment.

(*b*) The procedure by way of appeal was in substance the criminal procedure of the Anglo-Saxon period. We have seen that in spite of the discouragement of the royal courts,[8] and in spite of the greater advantages afforded by the action of trespass,[9] it lingered on all through this period, and later; and that it emerged for the last time in 1819.[10] It could in most cases be begun by any private person, or by an approver. The approver was the king's evidence of mediæval law.[11] He was a person who confessed his guilt, and, as a condition of obtaining a pardon, offered to appeal and convict a certain number of other criminals.

[1] Vol. ii 102.
[2] P. and M. ii 577.
[3] Hale, P.C. ii 156, citing cases of 2 and 10 Ed. II.
[4] Ibid; P. and M. ii 577.
[5] P.C. ii 149.*
[6] 25 Edward III. st. 5 c. 4; 28 Edward III. c. 3; 42 Edward III. c. 3.
[7] Vol. i 487.
[8] Vol. ii 198, 256, 360.
[9] Ibid 365.
[10] Vol. i 310; vol. ii 364.
[11] P. and M. ii 631—"a convicted criminal who had obtained a pardon conditional on ridding the world of some half dozen of his associates by his appeals."

The admission of an approver's appeals was always in the absolute discretion of the court;[1] and the conditions under which they would be admitted became the centre of a mass of technical learning.[2] But the admission of such appeals was open to obvious abuses.[3] The institution was decadent at the close of the mediæval period, and does not appear to have survived it. When Hale wrote it had "been long disused."[4]

We have seen that in the thirteenth century the king's judges were in the habit, if a plaintiff in an appeal was non-suited, or died, or released the appeal, of arraigning the defendant at the suit of the king.[5] This gave rise, as Hale points out,[6] to a distinct class of cases in which a proceeding for felony could be initiated without indictment. Some learning grew up as to the conditions under which this course could be pursued, which was becoming obsolete before the close of the mediæval period.[7] It is, however, a procedure which is historically interesting, as it makes a sort of transition stage between the old procedure by way of appeal and the new procedure by way of indictment. And this was not the only link between the old procedure and the new. In fact, the main historical importance and interest of the old procedure by way of appeal is the indirect influence it has had upon the new procedure by way of indictment. The procedure by way of indictment came into the common law at a time when the procedure by way of appeal was the normal procedure. We shall see that in this way much of the archaic formalism of the older system of criminal procedure was imported into the new; and the fact that the wording of the indictment imitated very faithfully the wording of the appeal was one of the causes for that extreme formalism which, till quite recently, clung around the wording of the indictment.[8] We shall see, too, that the ordinary framework of the new procedure by way of indictment and trial by petty jury was modelled on the old procedure by way of appeal;[9] that a similar link between the old procedure and the new will appear also in the law of civil procedure;[10] and that it has had a large share in giving both to the criminal and the civil procedure of the common law some of their most salient characteristics.[11]

[1] Hale, P.C. ii 226.
[2] Ibid 226-235.
[3] "The truth is, that more mischief hath come to good men of these kind of approvements by felon accusations of desperate villains, than benefit to the public by the discovery and conviction of real offenders," Hale, P.C. ii 226; in the thirteenth century Maitland tells us that "decent people who were in frankpledge and would put themselves upon a jury were not compelled to answer his accusations," P. and M. ii 631.
[4] Hale, P.C. ii 226.
[5] Vol. ii 256-257.
[6] P.C. ii 149.*
[7] Staunford, P.C. ff. 147b-149b.
[8] Below 617-618.
[9] Below 611-613.
[10] Below 632.
[11] Below 620-622, 628-629, 632.

(ii) Other exceptional forms of criminal procedure are due, not to archaic survivals, but to later developments of the common law. Of the procedure by way of impeachment, which has some affinity with the procedure by way of appeal, I have already spoken.[1] Of the development of the summary jurisdiction of the justices of the peace I have also said something,[2] and shall say more in a later volume.[3] I shall also reserve to a later volume the history of the procedure by way of information.[4] At this point I shall say a few words firstly of the case when the finding of a jury in a civil action might be the foundation of an arraignment at the king's suit; and secondly of the case when a person might be arraigned on the finding of a coroner's jury.

(*a*) It would seem that the rule that in certain cases the finding of the jury in a civil action might be the foundation of an arraignment at the king's suit, probably originated from an application to the action of trespass of the rule that abortive proceedings in an appeal might give rise to such arraignment. We have seen that the action of trespass was rapidly taking the place of the appeal in Edward I.'s reign;[5] and the earlier cases cited for this rule are all cases of trespass. The first case cited for it is a note in Fitzherbert's Abridgement of the year 1303.[6] The note runs as follows: "Trespass for goods carried away. The defendant pleaded not guilty, and the jury found him and another guilty as felons. Wherefore Sir Roger Bravafor held that he should immediately answer for the felony at the king's suit."[7] In 1344, in an action of trespass "de bonis viri cum muliere abductis." "The point was touched that if the defendant be found guilty by verdict, the king will take the verdict as an indictment, and that, if he thereupon be found guilty at the King's suit, it will carry judgment of life and member"—from which it was sought to draw the conclusion that in such a case no attorney could be appointed.[8] Possibly this rule was later extended to actions on the case;[9] and it was explained and justified by saying that a verdict of twelve men was equivalent to a present-

[1] Vol. i 379-385. [2] Ibid 293-294.

[3] Bk. iv Pt. I. c. 1.

[4] Bk. iv Pt. II. c. 7 § 2; it was known in the Middle Ages, P. and M. ii 658-659, but it does not attain its modern form or scope in this period.

[5] Vol. ii 364-365. [6] *Enditement* pl. 31.

[7] The conclusion of the entry is as follows: "Mes il dit si enquest ust passe en auter lieu que en bank le roy riens serra fait a la felonie tanque en Eire des Justices, etc.," which seems to mean that this course could only be pursued if the court trying the action had jurisdiction to try criminal cases.

[8] Y.B. 18, 19 Ed. III. (R.S.) 14; in Y.B. 13 Ed. IV. Mich. pl. 7, it was held that a special verdict that the accused had not taken goods feloniously, but that one John at Stile had, would not serve as a ground on which John at Stile could be indicted.

[9] Hale, P.C. ii 151,* says that if in an action of slander for calling a man thief the defendant justifies, and it is found for the defendant, the plaintiff could be arraigned on this verdict if given in a court which had criminal jurisdiction—but he cites no authority.

ment, so that, as Staunford and Hale explain, it did not contravene the statutes which provided that no man should be put to answer but upon presentment and indictment.[1] But probably this very *a priori* theory is not historically correct, and that, historically, its origin was simply the practice of the court in applying to the action of trespass the rule which they had long applied to appeals.

(*b*) If a coroner's inquest super visum corporis found that a certain person was guilty of murder or manslaughter, such person could be arrested, committed to prison, and tried on this presentment.[2] But this presentment of the coroner's jury was no bar to a similar presentment by the grand jury on the same facts, and an indictment on that presentment.[3] In that case the accused was in Hale's time generally arraigned upon both presentments simultaneously, if both were sufficient in law ;[4] but, as coroner's presentments were generally insufficient,[5] he was often indicted and arraigned on the presentment of the grand jury only. If in that case he was acquitted the coroner's presentment could be quashed if it was insufficient ; or, if not, he could then be arraigned on the coroner's presentment and plead *auter foits acquit*.[6] There was a small difference of procedure between a trial on the coroner's and the grand jury's presentment, which arose from the difference between the object of the finding of the grand jury and the coroner's jury. The grand jury only presented the prisoner as suspected. If therefore the petit jury negatived that suspicion by a verdict of not guilty their duties were at an end. On the other hand, the presentment of the coroner's jury found two things, firstly that some one was killed, and secondly that the prisoner was the murderer. Though their second conclusion was negatived by a verdict of acquittal, their first was not. Therefore the petty jury who acquitted were obliged to say who did kill the person in question ; and on their finding the person named by them could be arraigned. But the change in the character of the jury had reduced this rule to a mere form when Hale wrote—"commonly if they cannot tell, they give in some fictitious name as *John-a-Noke*, which serves the turn."[7]

(2) *The normal procedure of indictment and trial by petty jury.*

The normal procedure of indictment on the presentment of the grand jury and trial by petty jury was introduced at a time when the older conception of a trial was the normal conception. Hence,

[1] Staunford, P.C. ff. 94b, 95; Hale, P.C. ii 151.*
[2] Hale, P.C. ii 64. [3] Ibid 221.
[4] Ibid 222. [5] Ibid. [6] Ibid.
[7] Ibid 64-65 ; it would seem from the Y.BB. cited by Hale, ibid 300, that this practice was well established in the fifteenth century ; but he points out that in the fourteenth century the law was otherwise, "and the jury that acquits, whether upon a presentment, or upon an indictment of homicide, shall be chaced to say who did the fact," citing 37 Ass. pl. 13.

as I have already pointed out, the new method of trial by jury, both in criminal and civil cases, was adapted to the old conception. Now we have seen that the old conception of a trial was very different from the modern conception.[1] The pleadings of the parties led up to some one of many modes of proof which might be either selected by the parties or adjudged by the court.[2] How those modes of proof worked it was impossible to enquire. All the legal interest of the case was centered in the questions which led up to the award of proof.[3] And all those questions were subject to fixed rules of procedure, which bound the judge as strictly as the parties; for it is a characteristic of these old procedural rules that the suitor is considered as having a legal right to their enforcement as against the court, and, therefore, a grievance against the court if they are not applied or misapplied.[4] The jury became almost the only mode of proof at a time when these old ideas of a trial were still prevalent; and consequently the jury was regarded as settling the matter in the same final and inscrutable manner as compurgation, battle, or ordeal.[5] Therefore in the new as in the older law, all the legal interest in the case turned upon what we should now regard as preliminary matters, such as the rules of process for getting the parties before the court, and the rules which defined the modes in which they should state their case when they were before the court. Just as in the older law, all these rules must be put in motion and strictly obeyed by the parties at their own risk, so now the parties must put in motion the machinery of process, and define with the same verbal accuracy as before, and with the same formal words, the crime with which the accused was charged.[6] But though the jury took the place of the older modes of proof, though the pleading of an older age was adapted to the proof by jury, the growing elaboration of the law, and the differences between the test of the jury and the test of such proofs as ordeal or battle, began a series of changes which eventually sub-

[1] Vol. i 299-302; vol. ii 103-107.

[2] Vol. i 301; P. and M. ii 599-600; Thayer, Evidence 9, 10.

[3] See e.g. Bracton s Note Book case 1115.

[4] P. and M. ii 663-665; vol. i 213-214; see ibid 521 for a survival of this idea in the Channel Islands; for a similar idea in Roman Law, see Sohm, Institutes (tr. G. Ledlie), ed. 1892, 153. Greenidge, Legal Procedure in Cicero's Time 84, speaking of the civil law formulæ, says: "Nor is it at all likely that these *civil* 'formulæ' were preceded by any ruling in law, by any promise of an action, or in fact by anything of the nature of an edict. For the prætor could not promise where he could not refuse, and the ruling was not his, but that of the *ius civile*. So far the prætor professes to be only an exponent of something beyond and behind him."

[5] Vol. i 317.

[6] For an analogy in Roman Law cp. Girard 952: "Il (le magistrat) donne simplement par son concours une sorte d'authenticité indispensable aux actes des parties, spécialement à ceux du demandeur . . . son rôle est un rôle d'assistant sinon purement passif au moins un à peu près mécanique;" Greenidge, Legal Procedure in Cicero's Time 84.

stituted for the old system of proof a very different conception of a criminal trial.

At the end of this period a very different conception of a criminal trial had emerged, which, as we shall see, was fundamentally different from that which was emerging in any other country in Europe. But it was historically connected with the older conception, and owed some of its most valuable characteristics to this fact. We shall see how this came about if we look, firstly at the differences between the new and the old procedure which followed from the introduction by trial by jury, and from the growth and elaboration of the common law rules of procedure; and secondly at the resemblances which, in spite of all these changes, still existed.

(i) *The differences between the new and the old procedure.*

Firstly, the jury was not a mechanical test like ordeal or compurgation or battle, but a body of intelligent men who were sworn to "well and truly try and true deliverance make between our sovereign lord the king and the prisoner at the bar." Hence we get rules as the persons whom the prisoner could object to as jurors which were approaching their modern form when Fortescue wrote [1]—he tells us, for instance, that the accused could challenge peremptorily thirty-five.[2] We get rules as to the mode in which the jury must give their verdict,[3] and as to the possibility of its modification;[4] as to their safe custody while they are considering it;[5] and as to their right to find the prisoner guilty of a lesser charge than that with which he is accused. If, for instance, he was accused of grand larceny he could be found guilty of petty larceny;[6] and if he was accused of murder or manslaughter the jury could find that the homicide was committed *se defendendo* or *per infortunium*.[7] But in the latter case, Hale tells us, the jury must find the special matter, "and if upon the special matter shown it shall appear to be murder or manslaughter, the court will accordingly judge of it, though the jury conclude *et sic per infortunium*, or *sic se defendendo*." [8]

Secondly, as this last cited rule shows, the jury could not decide matters of law. On a proper direction by the judge they

[1] Vol. i 336. [2] De Laudibus c. 27.

[3] Thus if the jury say they are agreed and are not the court may fine them, 29 Ass. pl. 27, and 40 Ass. pl. 10; in cases of treason or felony they must give their verdict in open court, and could not, as in other cases, give a privy verdict, Co. Litt. 227b; vol. i 319 nn. 2 and 3.

[4] After the verdict was recorded they could not retract it, Fitz., Ab *Corone* pl. 108 (7 Rich. II.); but they could before, Plowden at p. 211.

[5] Y.B. 24 Ed. III. Hil. pl. 10.

[6] Fitz., Ab. *Corone* pl. 451 (41 Ed. III.).

[7] Ibid pl. 284 (3 Ed. III.). [8] P.C. ii 302.

could find a general verdict of guilty or not guilty.[1] But it was always open to them to find a special verdict, and ask for the judgment of the court thereon.[2] Thus we get a distinction between issues of fact and law which was foreign to the primitive procedure in which the assertion of the appellor was met by the denial of the appellee, and followed by an award of proof.[3]

Thirdly, the growing elaboration of the law made it possible for the accused to plead many other pleas besides the flat denial which seems to have been the only defence possible under the old system.[4] Thus there were pleas which questioned the jurisdiction of the court to try him, such as the plea of clergy or sanctuary.[5] As we have seen, the former plea could be urged after conviction; and this had come to be the usual course in the latter part of the mediæval period.[6] There were pleas in abatement of the indictment; and we shall see that the strictness required in the wording of indictments rendered such pleas very common. They also could be and generally were urged after conviction; and to argue such pleas the prisoner could have counsel assigned.[7] There were pleas in bar of the indictment—pleas of a pardon general or special,[8] pleas of auterfoits acquit,[9] or auterfoits convict.[10] A mass of learning was beginning to accumulate round these pleas during the mediæval period, both on the question as to the mode in which they could be proved, and on the question as to the circumstances under which they were available. Upon an indictment for treason or felony the accused was allowed to urge pleas of this kind, and then plead over the general issue not guilty if they were found against him.[11] The contrary rule, observed in civil cases[12] and on indictments for misdemeanours,[13] was here relaxed in favorem vitæ. On the other hand, a prisoner might, if he were very badly advised, demur to the indictment.[14] As a demurrer admits all the

[1] An early illustration of a summing up by a judge with a direction to the jury somewhat after the modern style will be found in 22 Ass. pl. 55; but in the report the judge's statement of the law is given, not in the direction to the jury, but after their verdict; it is clear, however, that he expected a special verdict, but that they gave a general verdict of not guilty with which he agreed.

[2] For instances see Fitz., Ab. *Corone* pl. 284; Y.B. 13 Ed. IV. Mich. pl. 7; Mackalley's Case (1612) 9 Co. Rep. 65b; for a general account of the power of the jury to find a special verdict in civil and criminal cases see Dowman's Case (1584) 9 Co. Rep. at ff. 11b-13b.

[3] See P. and M. ii 627-628.

[4] Vol. ii 106.

[5] Above 293-307.

[6] Above 298.

[7] Below 615-619.

[8] Staunford, P.C. 99a-104b.

[9] Ibid 105a-107b.

[10] Ibid 107b-108a.

[11] "Regularly, where a man pleads any plea to an indictment or appeal of felony, that doth not confess the felony, he shall yet plead over to the felony *in favorem vitæ*, and that pleading over to the felony is neither a waiving of his special plea, nor makes his plea insufficient for doubleness," Hale, P.C. ii 255, citing Y.B. 22 Ed. IV. Hil. pl. 1 (p. 39).

[12] Below 631-632.

[13] Kenny, Criminal Law 471.

[14] For demurrers see below 629.

facts set out in the indictment it followed that the determination of such a demurrer against the prisoner was equivalent to a conviction. "It is," says Hale,[1] "a confession of the indictment, and indeed a wilful confession, for he may have all the advantages of exception to the insufficiency of the indictment . . . by way of exception either before his plea of *not guilty*, or after his conviction and before judgment, as he might have by demurrer."

(ii) *The resemblances between the new and the old procedure.*

It is the resemblances between the new and the old procedure which are the most striking, and, from some points of view, historically the most important.

Firstly, though it had become possible for an accused person to plead many other pleas besides a bare denial, the method of pleading in criminal cases, unlike that in civil cases, has always adhered more closely to the old forms. Pleading in criminal cases was always oral. It is true that the indictment, unlike the accusation of the appellor, was written; but this written indictment was in form and in fact a presentment to the king on which the king took action.[2] It must always be read to the prisoner on his arraignment;[3] and, because it was in its written form a presentment to the king, the prisoner was not at common law entitled to a copy.[4] It was far from simple, as we shall see;[5] but we shall see also that this elaboration has ancient roots.[6] On the other hand, the pleas advanced by the accused were not only oral but simple. It is true that a mass of technical learning accumulated round these different pleas. But that learning related, not to the form of the plea, but to the circumstances under which it could be pleaded, and its effect when it was pleaded in those different circumstances. The form of the plea was always the same. In fact this was necessarily the case. We shall see that the elaboration of the forms of pleading in civil cases arose partly from the greater elaboration of the facts of those cases, but mainly from the fact that the parties could employ professional advisers who spoke or,

[1] P.C. ii 257.

[2] "But here, my Lords, I would first observe the reason and use of a presentment or indictment, it is to apprise the king of such an offence committed, as it is of an office, to inform him of a title in civil matters," R. v. Berchet (1691) 1 Shower at p. 120 *per* Shower *arg.*

[3] Hale, P.C. ii 219.

[4] Ibid 236; the rule was changed as to treason by 7, 8 William III. c. 3; the reason for the rule had ceased to be apparent in the seventeenth century, see the remarks of Jeffreys, C.J., in R. v. Rose (1684) 10 S.T. at p. 267; but the rule was undoubted, see R. v. Charnock (1696) 12 S.T. at pp. 1381-1382 *per* Holt, C.J.; there can be little doubt that it was retained because, taken in connection with the rule that the prisoner could not be advised by counsel, it prevented him from taking some of those captious objections to the indictment which we shall see were possible, below 617-618.

[5] Below 617-618. [6] Below 618.

in later days, drew their pleadings.[1] But in cases of treason or felony the accused was not allowed to be represented by counsel.[2] Therefore there was no opportunity for the development of the science of pleading on the lines on which it developed in civil cases. For the same reason also the accused was, as we have seen, generally allowed to plead over not guilty, even though any special pleas he had advanced had failed.[3] The rule that a man must plead at his peril the right plea could not fairly be enforced against a prisoner ignorant of law who was fighting for his life; and this feeling tended to make the courts willing to allow a prisoner under a plea of not guilty to urge anything he could in his defence,[4] as probably he could have done under the older system; and, even after conviction, to allow him to urge anything he could as a reason why sentence should not be passed.

Secondly, we have seen that the whole question of guilt or innocence was submitted to the jury as to one of the older modes of proof. The court refused to divide them and treat them as witnesses, or even to accept the verdict of a majority.[5] It accepted their verdict as it used to accept the results of ordeal or compurgation. It did not trouble itself with questions of evidence; for as yet the law of evidence was very rudimentary. It only took care to provide that the jury should be likely to know something of the facts by making it necessary that all or some of them should come from the neighbourhood.[6] The accusation was contained in the indictment; the accused could make what defence he liked; the court could sum up the case; and on this material the jury must decide as best they could. It is difficult to see how such a method of trial could have been invented except by men who lived so close to the age in which the older methods of proof were living things, that they could consider it natural to submit in this way the whole matter to the jury.

Thirdly, the most distinctive characteristic of the new mode of procedure was the written indictment;[7] and the formality, certainty, and verbal precision required in an indictment has always been one of the most salient characteristics of English criminal procedure. Of this matter, therefore, I must speak at somewhat greater length. Firstly, I shall give one or two illustrations of the formal and minute accuracy required in indictments; secondly, I shall try to account for the origin of these rules; and, thirdly, I shall say a few words as to their effects. We shall

[1] Below 641-642.
[2] Vol. ii 107, 312; Y.B. 30, 31 Ed. I. (R.S.) 530.
[3] Above 614.
[4] P. and M. ii 651.
[5] Vol. i 318.
[6] Ibid 332.
[7] For an account of the form of an indictment see Stephen, H.C.L. i 275-284.

see that, though it is not wholly due to the rules which required a similar formalism and accuracy in the statement of an appellor's case, it probably originates in an imitation of those rules.

(*a*) The Abridgments and the Year Books show that the rules as to formality, certainty, and verbal precision required in indictments had already gone considerable lengths at the close of the mediæval period; and they increased in complexity during the sixteenth and seventeenth centuries. To illustrate them I shall adopt Hale's arrangement,[1] and give one or two instances from the Year Books and later reports.

(i) The name and condition of the accused must be truly stated. If the name was untruly stated,[2] or his "addition" falsely or too generally stated,[3] the indictment could be quashed. (ii) The year and day in and on which the crime was committed must be certainly stated. Thus if A were indicted that on the feast of St. Peter in a certain year he killed J.S. the indictment was defective because there are two feasts of St. Peter in each year.[4] (iii) The same rule applied to the place where the crime was committed. Thus where A was indicted "*quod ipse tali die et anno apud C in quendam B insultum fecit, et ipsum cum quodam cultello felonice percussit occidit et murdravit*, without saying *ad tunc et ibidem percussit occidit et murdravit*, the indictment was not good, for the assault might be at one day and place and the killing at another."[5] (iv) The name of the victim of the crime, if known, must be inserted. If not known he must be described as "quidam ignotus." Thus when the indictment alleged that the accused *invenit quendam hominem mortuum ac felonice furatus est duas tunicas*, and did not go on to say *de bonis et catallis cujusdam ignoti*, it was insufficient.[6] (v) The offence must be charged with certainty. It was insufficient to charge a man with being a *communis latro*, or *communis champertor*, or a *communis malefactor*.[7] (vi) A similar certainty was needed in stating the act done by the accused, and the manner in which he did it. Thus to allege that A *felonice abduxit unum equum* without saying *cepit et abduxit* was not good, as he might have

[1] P.C. ii chap. xxv.

[2] Y.B. 11 Hy. IV. Hil. pl. 7.

[3] Y.B. 9 Ed. IV. Hil. pl. 2; Sir Henry Ferrers's Case (1635) Cro. Car. 371; the need to insert in original writs, appeals, and indictments "additions" of the estate degree or mystery of the defendants or accused, and of the towns or hamlets or places and counties where they resided, was due to 1 Henry V. c. 5.

[4] Y.B. 3 Hy. VII. Pasch. pl. 2; cf. Y.B. 9 Hy. VII. Hil. pl. 1.

[5] Hale, P.C. ii 180, citing Thomas Buckler's Case (1552), Dyer 68b; cp. Y.B. 1 Rich. III. Mich. pl. 1 *per* Fairfax.

[6] Fitz., Ab. *Enditement* pl. 27 (11 Rich. II.); Long's Case (1597) Cro. Eliza. at p. 490.

[7] 22 Ass. pl. 73; 29 Ass. pl. 45; Hale, P.C. ii 182.

had the horse by bailment, and then it was no felony;[1] and an indictment for high treason which omitted the words *contra ligeantiæ suæ debitum* was insufficient.[2] The absence of the word *felonice* in an indictment for felony was fatal;[3] and so was the mispelling murd*e*ravit for murdravit.[4] In the case of murder the weapon must be specified, whether it was held in the right or left hand, in what part of the body the wound was inflicted, the nature and description of the wound, the fact that the party died of the wound, and the date of the wound and the death.[5] (vii) There must be a proper conclusion. An indictment which concluded *contra pacem* without adding the words *domini regis*,[6] was insufficient; and the question when it was necessary to conclude *contra formam statuti* gave rise to many decisions.[7] Hale points out that, as none of the statutes of jeo-fail[8] applied to indictments, a defective indictment was not aided by a verdict of guilty. It followed that, even if a prisoner had neglected to take advantage of the insufficiency of the indictment on his arraignment, he could do so after conviction at any time before judgment was pronounced upon him.[9]

(*b*) It seems to me that this extraordinary and irrational set of rules which had grown up round the wording of indictments were due to the cumulative effect of several distinct causes. Firstly, there can be little doubt that the verbal accuracy required in the old appeals was transferred to the indictments which were taking their place. Secondly, at a later period, the courts applied to indictments the same rules of verbal exactness which they were applying to the more elaborate pleas which were coming into use in civil cases.[10] Though the fact that the accused was not represented by counsel supplied a good reason for keeping the pleas open to the accused simple, there was no such reason for insisting on simplicity in the wording of the indictment, for, necessarily, the crown was always represented by counsel. Thirdly, the indictment was always a written document. Though the oral reading of the indictment to the prisoner on his arraignment was the formal

[1] *Per* Brian, C.J., in Y.B. 13 Ed. IV. Pasch. pl. 5 (p. 10), citing cases of 2 and 8 Ed. III.

[2] R. v. Tucker (1693) 1 Ld. Raym. 1.

[3] Staunford, P.C. 96a; similarly the absence of the word "rapuit" in an indictment for rape, Y.B. 9 Ed. IV. Trin. pl. 35.

[4] Ryle's Case (1603) Cro. Eliza. 920—though the court held in that case that "Burg*a*lariter" for "Burglariter" did not vitiate the indictment; but see *contra* Vaux v. Brooke (1586) 4 Co. Rep. 39b.

[5] Hale, P.C. ii 185-186, and the cases cited.

[6] Ibid 188.

[7] Ibid 189-193.

[8] For these statutes see vol. i 223.

[9] Hale, P.C. ii 193; an instance where this course was successfully pursued is R. v. Rosewell (1684) 10 S.T. at p. 260 seqq.

[10] Below 619.

accusation, though for that reason the prisoner was not entitled to a copy of the written document,[1] the court had the written document before them. They therefore treated this written document as they were accustomed to treat writs, conveyances, and, in the sixteenth century, pleadings. They in effect refused to give it the effect intended by its framer if it was capable of any other meaning;[2] and they justified their refusal by the salutary rule that in capital cases the utmost certainty was required.[3] Here, as in other branches of the law, the dialectical acuteness of the judges, and the habit in later law of reporting these cases of construction and treating them as authoritative, stereotyped in the law a mass of captious and misplaced ingenuity. Coke once tried to state the principle upon which the court proceeded in these cases; but as might be expected, with very little success.[4] Fourthly, the permission given by the courts to prisoners to employ counsel to argue exceptions to the indictment tended to aggravate the existing tendency of the judges to show their acuteness by picking holes in indictments.[5]

(*c*) The evil effects of this manner of treating indictments are obvious. Hale said that the strictness shown in indictments with a view to saving life had grown to be "a blemish and an inconvenience in the law." "More offenders escaped by the over-easy ear given to exceptions in indictments than by their own innocence, and many times gross murders, burglaries, robberies, and other heinous and crying offences escape by these unseemly niceties, to the reproach of the law, to the shame of the government, and to the encouragement of villainy, and to the dishonour of God."[6] If these results were produced in the days when the prisoner was not allowed to see a copy of his indictment before his trial, and when he could not be advised by counsel, much more were they likely

[1] Above 615 and n. 4.

[2] "An indictment ought to be certain to every intent without any intendment to the contrary," Long's Case (1597) Cro. Eliza. at p. 490.

[3] "And indictments for felony, which are as counts and declarations for the king against the parties for their lives, ought to have certainty expressed in the record of the indictment and shall not be supplied or maintained by intentment or argument. For if counts between party and party for land or chattels ought to have two things, *scil.* truth and certainty . . . *a fortiori* indictments, especially those which concern the life of a man," Long's Case (1605) 5 Co. Rep. at f. 120b.

[4] Long's Case (1605) 5 Co. Rep. at f. 121a where he divided certainties into the three categories of (i) certainty to a common intent which was sufficient in "bars which are to defend the party and to excuse himself;" (ii) certainty to a certain intent in general which was required in indictments, and counts; and (iii) certainty to a certain intent in every particular, which was never required. It is easy to lay down principles of this kind, but obviously quite impossible to bring all this mass of decisions under them—as is clear from Hale's chapter on this subject.

[5] See e.g. the objections urged in Long's Case (1605) 5 Co. Rep. 120a, and in Mackalley's Case (1612) 9 Co. Rep. 65b.

[6] P.C. ii 193.

to be produced when in cases of treason, he was allowed to have a copy, and when in the eighteenth century, counsel were allowed to help the prisoner in every way except addressing the court in his favour.[1] Stephen, writing in 1882, said[2] that "it is scarcely a parody to say, that from the earliest times to our own days, the law relating to indictments was much as if some small proportion of the prisoners convicted had been allowed to toss up for their liberty."

But in spite of these evil effects this state of the law had three very obvious advantages. Firstly, as Stephen has pointed out,[3] it prevented the "arbitrary multiplication of offences and extension of the criminal law by judicial legislation in times when there were no definitions of crimes established by statute, or indeed by any generally recognized authority." As he says "looseness in the legal definitions of crimes can be met only by strictness and technicality in indictments." The decision, for instance, that an indictment accusing a man with being a *communis latro* was insufficient by reason of the uncertainty of the offence charged was very salutary. Secondly, the fact that the crown was treated like the appellor in an appeal, and therefore compelled to state its case with the same particularity and formality, was the strongest security against the arbitrary power of the crown, and the strongest guarantee that the law would be enforced even as against the crown. For this reason the enforcement of these strict rules played no small part in securing the victory of the mediæval ideal of the supremacy of the law. Thirdly, it preserved the idea that, as the crown must prove its case, any defences which could disprove that case were open to the accused. For this reason it helped to implant in the minds of the common lawyers that fear of convicting the innocent to which Fortescue testifies when he says that "I would rather wish twentie evill doers to escape death through pitie than one man to be unjustly condempned."[4] It helped to engrain in the common law that presumption in favour of innocence which it has always professed. In the following period, when that presumption was considerably weakened, it was mainly in these rules as to the sufficiency of indictments that it lived on, and was able to influence our modern criminal procedure.

(3) *The peculiarities of the English system of criminal procedure.*

In many different countries in Europe, from the thirteenth century onwards, the need to establish an efficient criminal procedure was felt. Abroad this need was generally supplied, then or later, by sweeping away the old procedure in which a definite accuser

[1] Stephen, H.C.L. i 424.
[2] Ibid 284.
[3] Ibid 293.
[4] De Laudibus c. 27.

took proceedings against the accused and undertook to prove his guilt by ordinary legal processes, and substituting the inquisitorial procedure of the canon law.[1] This new procedure did not take the form of an accusation, but of an enquiry instituted by the state. We shall see in the following Book that the state gradually took more and more powers against the accused, that to assist it in its enquiry it assumed and made a regular part of its procedure the power to torture the accused, and that the trial became a secret proceeding which gave the accused little chance of making any effective defence.[2]

In England, on the other hand, the old accusatory procedure was adapted to the needs of a modern state. The machinery of presentment and indictment superseded the appeal; trial by petty jury superseded trial by battle; and many of the older technical rules which had fettered the usefulness of appeals disappeared. This new procedure, though accusatory, was a true criminal procedure—the king prosecuted, and every indictment alleged that the accused had offended "against the peace of our lord the king his crown and dignity." But just as trial by jury inherited some characteristics of the older methods of trial, because it was introduced at a time when the ideas underlying these older methods were generally accepted;[3] so, for the same reason, the procedure by indictment inherited two of the salient characteristics of the procedure by way of appeal.

In the first place, both were accusatory.[4] There is a definite accuser—the crown, or, in the middle ages, a jury of presentment of their own knowledge, or a private person who prosecutes in the name of the crown; and it should be noted that a private person has just as much right to prosecute in the name of the crown as the crown itself. "In England," says Stephen,[5] "and, so far as I know, in England and some English colonies alone, the prosecution of offences is left entirely to private persons, or to public officers who act in their capacity of private persons and who have hardly any legal powers beyond those which belong to private persons. . . . Every private person has exactly the same right to institute any criminal prosecution as the Attorney-General or any one else."[6] Thus the procedure by way of indictment, like the procedure by way of appeal, stood out in strong contrast to the

[1] Thus Esmein tells us, History of Continental Criminal Procedure 143, that in France "the accusation by formal party died out in the sixteenth century without being suppressed by law."

[2] Bk. iv. Pt. I. c. 4; see P. and M. ii 653-655.

[3] Vol. i 320; above 616.

[4] P. and M. ii 655.

[5] H.C.L. i 493, 495.

[6] For some modern restrictions on the right of any private person to prefer an indictment to the grand jury imposed by the Vexatious Indictments Act 1859 see Kenney, Criminal Law 464, 465.

inquisitorial procedure, which put the initiation of the proceedings entirely into the hands of a public official.

In the second place, the view taken by English law as to the nature of a criminal proceeding came to differ entirely from the view taken by continental law. Under the English system the procedure is conceived of as an action between a plaintiff and a defendant to be tried by a process substantially similar to that employed in any other action. Under the continental system the procedure is conceived of, not as an action between parties, but as an enquiry into the guilt or innocence of a suspected person conducted by officials. It follows that under the English system the rules of procedure applicable to an ordinary action ought to be followed. We have seen that the indictment inherited from the appeal the necessity to show an even greater exactitude of expression than was required in any other writ or pleading.[1] There is the same liberty of defence as in any other action, and the same trial by jury; and, though the crown possessed some advantages —the prisoner for instance could not employ counsel—these advantages were comparatively few. When, in the fifteenth century, Fortescue wrote his praises of the laws of England the fairness and humanity of the English system of criminal procedure could be contrasted with the continental system. "In this kinde of proceeding," he says, "there is no cruelty or extremity used, neither can the innocent and unguilty person be hurt in his bodie or limmes: wherefore hee shall not stand in feare of the slander of his enemies, because hee shall not be racked or tormented at their will and pleasure."[2]

In fact, just as in the sphere of government central and local the maintenance of older forms and older ideas had been made possible because they had been rationalized by the strong kings of the twelfth and thirteenth centuries, and by the statesmen and lawyers of the fourteenth and fifteenth centuries;[3] just as the maintenance of these older forms and older ideas was giving rise to a unique form of representative assembly, a unique form of local government, and a unique theory of government based upon the supremacy of the law and the overriding supremacy of Parliament;[4] so, in the sphere of criminal law, the maintenance of older ideas had given rise to a unique conception of a criminal trial—a conception which in the future was to do no small service both to the cause of humanity and the cause of constitutional government. Like the English theory of government it was destined in the future to be a model to the nations of the world.[5]

[1] Above 617-619.
[2] De Laudibus c. 27.
[3] Vol. ii 404-405.
[4] Ibid 429-434, 441-442; Bk. iv Pt. I. c. 1.
[5] "When in the eighteenth century French philosophers and jurists rebelled against it (the inquisitory procedure), and looked about them for an accusatory, con-

But all this is as yet in the remote future. The English system of criminal procedure, as it emerged at the close of the mediæval period, had the defects of its qualities. The meticulous accuracy required in indictments, and the growing technicality and formalism of many other parts of criminal procedure, played into the hands of the lawless and unscrupulous in that litigious age. When Fortescue stated that "it is not to be suspected that any offendour can under this forme escape the punishment of his offence,"[1] he was stating what he must have known not to be true.[2] The English system of criminal procedure, like many other parts of English law, needed to be reformed and strengthened. We shall see that in the sixteenth century it was reformed and strengthened by borrowing certain ideas from the continental system. But we shall see that the main features of the criminal procedure of the mediæval common law were still retained; and that when, at the end of the seventeenth century, the victory of the Parliament secured the supremacy of the political ideals of the common lawyers, this criminal procedure, reformed and strengthened by the new ideas which it had borrowed in the sixteenth century, preserved for the modern English state those qualities of fairness and humanity for which it was already conspicuous in the days of Fortescue.[3]

§ 2. The Civil Law

Process

We must remember that at the beginning of this period the law is only just emerging from that primitive stage in which the securing of the appearance of the defendant is a difficult problem; and that it is still in that stage in which the difficulties of travel make process slow.[4] Rules based upon primitive legal ideas, and upon physical necessities of an older age, became the permanent basis of an elaborate superstructure of technical rules. The rules of law upon this subject had become fixed before they had had time to become rational. It followed that with every increase in the complexity of the law these fixed rules became less rational and a greater hindrance to justice. We have seen that every action possessed its special machinery and its special formulæ for working that machinery.[5] A lawyer who wished to do his duty by his client must be at home with all the capacities of that machinery, in order that he might know at each stage of the case

tradictory, public procedure, a procedure which knew no torture, they looked to ancient Rome and modern England," P. and M. ii 654-655; cp. vol. i 319-320.

[1] De Laudibus c. 27.
[2] Vol. ii 415-416, 457-459.
[3] Bk. iv. Pt. I. c. 4; Pt. II. c. 7 § 2.
[4] P. and M. ii 589, 590.
[5] Vol. ii 520-521.

what chances were open. Many a good case might be lost, or a bad case won, or at least a decision upon it delayed, if the right step were taken at the right time, or if prompt advantage were taken of an unskilful move or a verbal error.[1] It would be both tedious and useless to go into details about the process used to get a defendant before the court, and the various forms of process which might issue in the course of a case, or after it had been decided. All that I shall attempt is to give a few illustrations of the complicated rules of process applicable to the real and personal actions.

In a real action the process to get a defendant before the court consisted, when "reduced to its lowest terms," of summons, seizure of the land into the king's hand, and finally judgment that the land be handed over to the demandant. Even then it was open to the tenant to reopen the whole dispute by means of a writ of right.[2] It would be in very few cases that process could thus be reduced to its lowest terms. The validity of the summons might be questioned.[3] Both the tenant and the demandant might cast many essoins—how many depended upon the kind of action brought. If there were several tenants they might at one time have delayed the proceedings almost indefinitely by fourching in essoins, that is by essoining themselves alternately;[4] and, even if this course were not adopted, the fact that several defendants had successive periods to essoin themselves could be used to delay the action indefinitely.[5] In many cases the hearing of the action might be hung up by claiming a view of the premises; and there was much litigation upon the right to have a view.[6] Then there might be vouching to warranty or aid prayer,[7] and the person vouched or prayed in aid might wish to essoin himself. Protections must be reckoned with, which would put the case without a day.[8] Infants might intervene and claim their age; and this would mean that the proceedings would

[1] Below 625 n. 2, 637 n. 6. [2] P. and M. ii 590, 591.

[3] E.g. Y.B. 1, 2 Ed. II. (S.S.) 19; in the Eyre of Kent (S.S.) ii 111 it was held that a summons in a real action must be served by substantial freeholders, and that if it was served by a bailiff it was void.

[4] 3 Edward I. c. 43; 6 Edward I. st. 1 c. 10; Reeves, H.E.L. ii 36, 37.

[5] There is a curious instance of this in an opinion in the Modern Conveyancer (1725) 158-159; the tenant in a writ of formedon enfeoffed 100 persons jointly, obviously for purposes of delay; the demandants were advised to sue the feoffor, relying on 13 Elizabeth c. 5 against fraudulent alienations, because "it will be fruitless to bring the formedon against all the enfeoffees, for every one of them will essoin; and if they be 100 of them then it will be 50 years before all will have essoined; and if any of them die in the meantime, his death abates that action, and you must begin de novo."

[6] E.g. Y.BB. 2, 3 Ed. II. (S.S.) 141; 3, 4 Ed. II. (S.S.) 144-145; 12 Rich. III. 137; early Roman civil procedure seems to have recognized something like the view, Greenidge, Civil Procedure in Cicero's Time 55, 56.

[7] Reeves, H.E.L. ii 632.

[8] E.g. Y.B. 12, 13 Ed. III. (R.S.) 316—a case which shows that this was so even when there were several defendants, and the protection was cast for one only; Reeves, H.E.L. ii 615.

be stayed till the infant had attained his majority.[1] All these various processes involved many writs and orders to the sheriff; and if the sheriff had taken the wrong steps to carry out the process, or if he had made any verbal fault in his returns, there was fresh material for disputes which delayed the hearing of the case.[2] In 1344 it was noted that "if the demandant omits in his process any part of his demand included in the original writ the whole is discontinued."[3] Booth tells us that the proceeding by the grand assize is very dilatory, and may become "vexatious to the Tenant by the Practice of the Demandant by not prosecuting and suing out Process as he ought, and many other Delays for want of Knights, there not appearing, or the like."[4]

Process in the case of personal actions was almost if not quite as lengthy; but there were not all the opportunities for delay in the course of the case which were afforded by some of the real actions. The essoins allowed were not so numerous;[5] and there could be no vouching to warranty. But in the older personal actions the process was lengthy and ineffectual enough.[6] There might be protections; there might be fourching in essoins—in an action of debt in 1345 "we see the defendants, after seven years of successful fourching, left fourching still *in infinitum*;"[7] and it was always possible to question the acts of the sheriff. Moreover, we must not forget that the ingenious means by which the three common law courts encroached upon one another's jurisdiction were merely perversions of their ordinary process which added to the technicalities of an already complicated system.[8]

Even in Edward I.'s reign it was possible for the judges themselves to make mistakes. "How is it," said Berewick to the sheriff, "that you have attached these people without warrant; for every suit is commenced by finding pledges, and you have attached although he did not find pledges?" etc. "Sir," said the sheriff, "it was by your own orders." "If it had not been so," notes the reporter, "the sheriff would have been grievously

[1] For a hard case of this kind, see Y.B. 1, 2 Ed. II. (S.S.) 150.

[2] See e.g. R.P. iii 594 (7, 8 Hy. IV. no 112) justice was delayed because the judges were "en divers opinions et ambiguities" owing to the fact that on the panel a juror's name was Congrove, while in the writs of Habeas Corpus and Distringas he was called Gongrove; see also Y.B. 3, 4 Ed. II. (S.S.) 24; the Eyre of Kent (S.S.) ii 85; for an instance of an original writ being abated for a false concord see Y.B. 6, 7 Ed. II. (S.S.) 182.

[3] Y.B. 18, 19 Ed. III. (R.S.) 152.

[4] Real Actions 115 and the case there cited; cp. ibid 157 for similar remarks as to process upon the writ of Formedon.

[5] Reeves, H.E.L. ii 95.

[6] See ibid i 500 for an example—it appears that even if no essoin were cast the process would take two years and more than eight months; for details see the passage cited App. VII.

[7] Y.B. 19 Ed. III. (R.S.) xxvi.

[8] Vol. i 218-222, 240.

amerced, *et ideo cave.*"[1] In Henry VI.'s reign Fortescue, C.J., was being pressed by the absurdity of a distinction which he was laying down as to when a writ of *Scire facias* would, and when it would not, issue against a person who had possession of the goods of one attainted. All he could reply was, "Sir, the law is as I say it is, and so it has been laid down ever since the law began; and we have several set forms which are held as law, and so held and used for good reason, though we cannot at present remember that reason."[2] When a judge of Fortescue's eminence is obliged to confess that he cannot explain the reason for a given procedural rule, and is reduced to infer its reasonableness from *a priori* views as to the inherent reasonableness of the law, we may be sure that the rule is coming to be an antique encumbrance.

In fact, the rules as to process were the least reasonable part of the mediæval common law. It is upon them that we must place a large share of the blame which attaches to that law in the fifteenth century for its failure to keep the peace and to punish wrong-doing;[3] and it is not until many of these complicated rules as to process went out of use with the decay of the real actions, and with reforms in the process of the personal actions, that the common law will be able to develop on rational lines. Fortunately for the common law it had, in the semi-criminal action of *trespass vi et armis*, an action the process in which followed the criminal model.[4] There could be no fourching in essoins.[5] It was possible to arrest the defendant, and in the last resort to outlaw him. The plaintiff was not left, as in some of the older personal actions, to the expedient of keeping on distraining a contumacious defendant, who very possibly had nothing by which he could be distrained.[6] Just as the spread of the actions of trespass and trespass on the case will help to liberalise and develop many branches of the substantive law, so the comparatively speedy process of the action of trespass will be adopted by the legislature, and applied to many other actions in order to effect a much needed reform in the adjective law. "By divers statutes," says Coke,[7] "process of outlawry doth lie in Account, Debt, Detinue, Annuity, Covenant, *Action sur le statute de* 5 Richard II.,[8] *Action sur la*

[1] Y.B. 30, 31 Ed. I. (R.S.) 258; cp. Y.B. 6 Ed. II. (S.S.) i 107.
[2] Y.B. 36 Hy. VI. pl. 21 (pp. 25-26) cited vol. ii 524 n. 6; and cp. ibid 515 n. 4.
[3] Vol. ii 415-416. [4] Above 606-607.
[5] "And moreover as to what he says that, if an essoin were to be adjudged, process infinite would follow, it is not so, because this [Ejectment of Wardship, above 17 n. 1] is a writ of Trespass in its nature, in which case one who appears will answer in the absence of his companion," Y.B. 20 Ed. III. (R.S.) ii 164 *per* Sharshulle, J.
[6] P. and M. ii 591-593; Reeves, H.E.L. i 452-456.
[7] Co. Litt. 128b.
[8] The statute of Forcible Entries, above 280.

case, and in divers other common or civil actions." But these developments belong to the following period in the history of the law.

Procedure and Pleading

In this section I shall deal firstly with the origins of the new system of procedure and pleading which was introduced by the advent of the centralized system of the common law, and with its development into a wholly unique system. Secondly, I shall say something of the change from the older system of oral, to the modern system of written pleading, and of the effects which this change, when it is complete, will have on English legal institutions and English law.

(1) *The origins and development of the new system of procedure and pleading.*

The rules of pleading—the mode in which and the conditions under which the parties state the case which is to be tried—go far to determine the shape of many rules of law. In old days the defendant must meet a plaintiff who had properly stated his case with a full denial;[1] but we shall see that, though this rule was long preserved, it had become possible in Bracton's day for a defendant, after making this full denial, to use divers "exceptions," and for the plaintiff to reply to these "exceptions."[2] We shall see also that in his day these rules were confused. It is not till Edward I.'s reign that we can see the beginnings of that unique branch of the common law—the law of pleading—the peculiarities of which cannot better be described than in the words of Stephen:[3]

"The object of all pleading or judicial allegation is to ascertain the subject for decision, so the main object of that system of pleading established in the common law of England is to ascertain it by the production of an issue. And this appears to be peculiar to that system. . . . In all courts indeed the particular subject for decision must of course be in some manner developed before the decision can take place; but the methods generally adopted for this purpose differ widely from that which belongs to the English law. By the general course of all other judicatures the parties are allowed to make their statements at large . . . and with no view to the extrication of the precise question in controversy; and it consequently becomes necessary before the court can proceed to decision to review, collect, and consider the opposed effect of the different statements, when completed on either side—to distinguish

[1] Vol. ii 106; P. and M. ii 605.
[2] Vol. ii 251, 283: below 630-631.
[3] Pleading (5th ed.), 137-138.

and extract the points mutually admitted, and those which, though undisputed, are immaterial to the cause—and thus, by throwing off all unnecessary matter, to arrive at length at the required selection of the point to be decided. This retrospective development is, by the practice of most courts, privately made by each of the parties for himself, as a necessary means to the preparation and adjustment of his *proofs;* and is also afterwards virtually effected by the judge in the discharge of his general duty of *decision;* while in some other styles of proceeding the course is different—the point for decision being selected from the pleadings by an act of the court or its officer; and judicially promulgated prior to the proof or trial. The common law of England differs from both methods by obliging the parties to come to issue; that is, to plead or to develop some question (or issue) *by the effect of their own allegations* and to *agree upon this question as the fact for decision* in the cause; thus rendering unnecessary any retrospective operation on the pleadings for the purpose of ascertaining the matter in controversy."

The question why the English mode of pleading is so different from that which prevails in other systems of law is one which can only be answered by legal history. The answer will be found in the peculiarities of the old conception of a trial, and in the mode in which that old conception of a trial was adapted to the jury system. We have seen, when dealing with the history of criminal procedure, that in the later common law, just as in the days when the older conception of a trial prevailed, all the complicated machinery of process must be set in motion by the parties at their own risk; and that all the minute rules as to the verbal accuracy with which the parties must state their case must be observed by them, likewise at their own risk.[1] Thus we get that which Stephen tells us is the characteristic feature of the English system of pleading—the settlement of the issue to be tried by the allegations of the parties. But we have seen that though the jury took the place of the older modes of proof, though the pleading of an older age was adapted to the proof by jury, the growing elaboration of the law, and the differences between the jury and the older modes of proof, set on foot a series of changes which substituted for the old system of proof a trial based upon the pleadings of the parties.[2] Thus we have seen that we begin to get the modern distinction between issues of fact which the jury must determine, and issues of law which the court must determine;[3] and that the growing elaboration of the law had made it necessary to allow the parties to plead many different kinds of pleas.[4] It is true that the old

[1] Above 612.
[2] Above 613-615.
[3] Above 614.
[4] Above 614-615.

ideas survived so far that a defendant must generally preface his defence by a flat denial—*Thwertutnay;*[1] but after that he could urge any other pleas he liked; and we shall see that, under the influence of the Roman ideas imported by Bracton, a very large facility for urging any sort of plea was given.[2] In 1312 it was said that "the mise ought to be joined by a simple denial which offers no opening of reply to the other side;"[3] but it was admitted that, if it was not so joined, the joinder would be valid and the other side might reply.[4] It is in developments of the law as to allowing these pleas, as to the mode in which an issue was reached through them, and as to the form which they took, that the system of pleading in civil cases begins to part company with the system of pleading in criminal cases, and to develop into a very technical, a very precise, and a very special branch of the common law.

It will perhaps conduce to a clearer understanding of the history of the steps by which this result was achieved if we glance at the principal species of pleas which had emerged at the close of this period, and continued to exist till the reform of the system of pleading in the last century. The Declaration (Count or Narratio), in which the plaintiff states his case, is the first pleading. To that declaration there may be either a Demurrer or a Plea. The defendant who demurs admits the facts as stated by the plaintiff, but contends that these facts give the plaintiff no cause of action. A demurrer therefore raises an issue of law. Of pleas there are many kinds. The defendant may plead to the jurisdiction of the court; or some matter which will suspend the action such as infancy; or in abatement—that is, he may contend that the writ or declaration is formally irregular; or in bar—that is, he may give an answer on the merits. That answer may take the form either of a Traverse—that is a denial; or of a Confession and Avoidance—that is, he admits the facts as stated by the plaintiff, but pleads other facts which put a different legal complexion on the matter. To a traverse the plaintiff may demur, or he may join issue upon it. To a confession and avoidance the plaintiff may plead a Replication by way of traverse, or confession and avoidance; to this replication the defendant may in like manner plead a Rejoinder; to the rejoinder the plaintiff may plead a Surrejoinder; to the surrejoinder the defendant may plead a Rebutter; and to the rebutter

[1] Vol. ii 106; below 631. [2] Below 630.

[3] Y.B. 5 Ed. II. (S.S.) (1312) 28.

[4] "*Ingham.*—You have joined this mise on the approvement with sufficient common saved, and so it is open to the claimant to say that sufficient common was not saved. *Herle.*—I might join mise on a charter, quit claim, etc., so that it was open to the other side to reply by saying that his ancestor was under age or was non compos mentis or was in prison at the time of the making of the charter, yet the mise would be good. And the mise stood."

the plaintiff may plead a Surrebutter.[1] Sooner or later the parties must reach either an issue of law by way of demurrer, or an issue of fact. The issue, when reached, is formally tendered and accepted; and it is decided by the court or the jury according as it is an issue of law or of fact.

This neat classification of the forms of pleading was only arrived at gradually in the course of the fourteenth and fifteenth centuries. In the age of Bracton the new permission to litigants to plead what pleas they liked threw the older rules into confusion; and it was some time before the new precise rules emerged. Maitland has pointed out that[2] Justinian had used words as to the sphere of an "exceptio" which were eminently calculated "to bewilder the mediæval lawyer."[3] Justinian's words led him to think that "every kind of answer to an action was an *exceptio*, and that Roman law allowed an almost unlimited licence to the pleaders of *exceptiones*." The result, to cite again a passage which has already been cited, was that "our records became turbid with exceptions, and a century passed away before our lawyers had grasped the first principles of that system of pleading which in the future was to become the most exact, if the most occult, of the sciences." The pleadings were long, argumentative, and double; and evidence was habitually pleaded.[4] But one important result followed from the new facilities allowed to the parties in the statement of their case. Many of the old formal words required to be spoken with literal accuracy by plaintiff and defendant gradually disappeared. In particular, the formal defence became merely a collection of words of court—formal words concealed in the record by an "etc." the meaning of which had departed.[5] It is for this reason, as Maitland has pointed out, that the form of a plea, e.g. in abatement.

[1] Maitland, P. and M. ii 613 and n. 1, points out that in the days of Bracton there are sometimes long debates between the parties, citing the Note Book case 716; he says that in the days of Edward I. he has seen no actual case of a triplication; and that the rejoinder and rebutter belong to a later age.

[2] P. and M. ii 609; vol. ii 282-283.

[3] "Comparatæ autem exceptiones defendendorum eorum gratia cum quibus agitur: sæpe enim accidit, ut, licet ipsa actio qua actor experitur justa sit, tamen iniqua sit adversus eum cum quo agitur," Instit. iv 13. pr.

[4] P. and M. ii 613; Stephen, Pleading n. 38.

[5] Y.B. 20, 21 Ed. I. (R.S.) 280 *Loutner* said, *arguendo*, "Every word spoken in court is not to be taken literally; they are only *paroles de la court;*" cp. Y.B. 3 Ed. II. (S.S.) 35, 167; Y.B. 17, 18 Ed. III. (R.S.) 584, Shardelowe says, "Many matters are counted by way of form which are not traversable;" P. and M. ii 606; for the distinction between the half defence when the defendant pleaded only to the jurisdiction or in disability, and the full defence used in other cases see Britton v. Gradon (1693) 1 Ld. Raym. 117; Stephen, Pleading (1st ed.) 433-434; this distinction was got round, Stephen tells us, "by making defence with an etc.," ibid 434; cp. the gradual disuse of the formal words of the Legis Actio; Cicero, Pro. Mur. II. 25 (cited Greenidge, Legal Procedure in Cicero's Time 163 n. 1), says "Primum dignitas in tam tenui scientia non potest esse. Res enim sunt parvæ,

is "quaintly illogical," if the literal meaning of the words used is pressed; for the defendant comes and defends, i.e. denies the wrong, "and then, after suggesting certain facts, will go on to ask the court whether he need answer, just as if a denial was no answer."[1] Similarly the form taken by the plea of the general issue[2] suggest that "a modern denial suggested by the practice of excepting, is tacked on to the ancient denial, the Defence or *Thwertutnay*."[3]

One or two rules from this age of Bracton survived in one shape or another in the later common law. Thus some of the Roman rules as to the order in which certain exceptions must be made[4] were repeated in Edward II.'s reign—"there is an order" it was said, "in which exceptions are to be made—first to the jurisdiction of the Court; second to the person of the party; then to the counting; then to the variance between writ and count; then to the action;"[5] and they became the source of similar rules in the later common law.[6] The later rule of the common law, that a plaintiff might amend his plea before it was enrolled,[7] appears in Bracton in the form of a rule that amendment was possible before an answer had been given to the plaintiff's claim.[8] Similarly the rule that a defendant can have only one plea in bar, which lasted till modified by statute in 1705,[9] appears

prope in singulis litteris atque interpunctionibus verborum occupatæ. Deinde, etiamsi quid apud maiores nostros fuit in isto studio admirationis, id enuntiatis vestris mysteriis totum est contemptum et abiectum."

[1] P. and M. ii 608 n. 3; as Stephen says, op. cit. 432, "this denial is mere matter of form; for the defence is used not merely when the plea is by denial or traverse but when by confession and avoidance also; and even when the plea does deny, other words are employed for that purpose besides the formal defence;" Coke, Co. Litt. 127b, tried to rationalize the old defence by saying that it was necessary for the defendant "to make himself party to the matter, and this is the reason that the defendant in this and the like actions can plead no plea at all before he makes himself party by this part of the defence."

[2] "And the said C.D. comes and defends the force and injury when etc. *and says* that he is not guilty of the said trespasses above laid to his charge or any part thereof, in manner and form as the said A.B. hath above complained. And of this the said C.D. puts himself upon the country."

[3] P. and M. ii 618 n. 2. [4] Ibid 612 and n. 1.

[5] The Eyre of Kent (S.S.) ii 38.

[6] Stephen says, op. cit. (1st ed.) 429, "the order of pleading, as established at the present day, is as follows:—1, to the jurisdiction of the court; 2, to the disability of the plaintiff or defendant; 3, to the count; 4, to the writ; 5, to the action. In this order the defendant may plead all these kinds of pleas successively. . . . But he cannot plead more than one plea of the same kind or degree. . . . So he cannot vary the order; for by a plea of any of those kinds he is taken to waive or renounce all pleas of a kind prior in the series."

[7] Below 637.

[8] "Cum autem per errorem aliquando fiat mentio de tempore indebito, si ipse petens erraverit, poterit intentionem suam mutare et errorem revocare . . . usque ad litis contestationem, scilicet quousque fuerit præcise responsum intentioni petentis, et ita quod tenens se posuerit in magnam assisam vel defenderit per duellum," f. 373a.

[9] 4 Anne c. 16 § 4.

in Bracton—he must not use two sticks to defend himself;[1] but it would seem that it was then a new rule, the scope of which was doubtful as late as the end of the thirteenth century.[2] In fact, at the end of the thirteenth century the theory of pleading known to our later common law was as yet hardly formulated; and if Bracton had been followed by a generation or two of judges, bound by their orders to know something of the civil and canon law, it might never have been formulated. Under the influence of judges of this school what happened in France might have happened in England—the jury might have come to be regarded merely as witnesses, and not as a body to which the parties had agreed to refer the determination of the issue; and English law might, like continental systems of law, have adopted a procedure based upon the procedure of the civil and canon law.[3] But this was not to be. The newer ideas of pleading, drawn in the first instance from the Roman law, and necessitated by the growing complexity of the common law, were reduced to order, and given a shape which was peculiarly English, because it was determined by the peculiarly English use of the jury as a mode of proof. We have seen that the jury was put into the place of the older modes of proof with as little change as possible,[4] and that the fundamental peculiarity of the English system of pleading—the settlement by the debate of the parties in court of the issue to be tried—was due to the survival of the older ideas as to a trial.[5] For the same reason and in the same way the shape which these new rules as to pleading took was coloured, in the first place, by the necessity for adapting the new ideas as to pleading to the requirements of the new mode of proof—the jury; and, in the second place, by some of the older characteristics of the pleading which had led up to the older modes of proof. These two causes determined the shape which the rules of pleading took in the fourteenth and fifteenth centuries; and, as in other branches of the common law, the shape which they took in these centuries has determined their essential

[1] Bracton f. 400b, cited P. and M. ii 603 n. 4; in later law this rule was connected with the principle that the issue must be single, Stephen, op. cit. 152; see ibid 290, 457-459; and this connection was being established early in the fourteenth century, below 633; it was stated in this way by Smith, De Republica Bk. ii c. 13—"And if a man have many peremptorie exceptions . . . because the xii men be commonly rude and ignorant, the partie shall be compelled to chose one exception whereupon to found his issue."

[2] P. and M. ii 603; Y.BB. 20, 21 Ed. I. (R.S.) 456-458, 463; 21, 22 Ed. I. (R.S.) 593 there cited.

[3] Vol. i 303-304, 314-320.

[4] Thus the verdict of the jury was as conclusive as the result of any of the other modes of proof—hence the rule that a plaintiff was concluded by a verdict from ever suing the defendant on the same facts again, though he was not thus concluded by a non-suit owing to his non-appearance when the verdict was to be given, Bl. Comm. iii 376-377.

[5] Above 628.

characteristics throughout their history. Let us examine the manner in which these two causes operated.

(i) *The adaptation of the new ideas as to pleading to the requirements of the jury system.*

The facts at issue were submitted to the jury as to one of the older modes of proof. But the new modes of pleading had made it possible for the parties to bring before the court complicated states of fact; and it was obvious that issues could not be placed before a reasonable body of men in the same manner as they were submitted to the decision of the older arbitrary tests. These two considerations are at the bottom of the requirements, which underlie the rules that the statements of the parties shall be not only material to the issue, but also single and certain.[1] "Each of the answers you give," said Staunton, J., in 1313-1314, "is a conclusive plea in itself: therefore abide by one or the other."[2] "We do not think," said Herle in argument in 1310, "that you can be received in court to give an answer that comprises two contraries—namely, that you are both privy and stranger. Therefore you must either disclaim outright or confess that you hold of us."[3] The need for distinguishing between issues of fact and law, the need (occasionally) for distinguishing cases in which trial by jury was applicable from cases in which it was not,[4] the need for ascertaining the venue from which the jury must come, the need for placing the point at issue in an intelligible form before the judge and jury, are at the bottom of these fundamental rules of pleading. Thus the problems which originated in the adaptation of the newer ideas as to pleading to the old conception of proof, and the problems which originated in the fact that the proof was now, not an arbitrary test, but the finding of a body of reasonable men, are the factors which determined the fundamental rules of the common law system of pleading.

As Stephen's work on pleading shows, the need for solving these problems determined also the minuter rules of the science. In fact, it was his perception of this fact which enabled him to write his classic treatise. At this point it is only possible to note briefly one or two examples of these rules developed in this period.: There must be no argumentative pleading[5]—plaintiff and defendant must clearly state their cases, and not leave their meaning to be gathered

[1] "Issue, *Exitus*, a single certain and material point issuing out of the allegations and pleas of the plaintiff and defendant, consisting regularly upon an affirmative and negative to be tried by twelve men," Co. Litt. 126a.

[2] The Eyre of Kent (S.S.) iii 119; cp. Y.BB. 3, 4 Ed. II. (S.S.) 89 *per* Bereford, C.J.; 20 Ed. III. (R.S.) ii 202 *per* Huse; 12 Richard II. 15; above 632 n. 1.

[3] Y.B. 3, 4 Ed. II. (S.S.) 75.

[4] See The King v. Cooke (1824) 2 B. and C. 871 for a curious survival of this reason for certainty in pleading.

[5] Reeves, H.E.L. iii 624, 625.

by argument or inference. A common instance of such a pleading was the case where a defendant, instead of denying a plaintiff's statement, pleaded another fact inconsistent with it. Thus if A had pleaded that one X was at Oxford on such a date, and B answered that X was at Banbury, there were really two issues raised.[1] Hence by the reign of Henry VI. the courts had laid it down that every affirmative must be answered by an express negative. Thus B should plead that X was at Banbury "absque hoc," or "sans ceo que" that he was at Oxford. This negative statement was called a "traverse." On the same principles the court objected to what was called a "negative pregnant." "An instance of this may be seen where in an action on the case against an innkeeper for goods lost by his default, the defendant pleaded that they were not taken by his default; which answer was construed to be a denial *pregnant* with an admission that they might have been taken, though not by his default."[2] The defendant was obliged to plead the exact facts. Similarly a double plea was not as a rule allowed. "Thus where (in a real action) bastardy was pleaded as to one acre, and joint tenancy as to another, the plea was held double because bastardy went to both."[3] The proper way was to plead one point and to state the other by way of "protestation"—always provided that the facts stated in the plea were not inconsistent with the facts stated in the protestation.[4] The rule against "departures" in pleading depended upon exactly the same principle. Everything which was stated in subsequent pleadings must support the facts stated in the first pleading—otherwise no certain issue could be reached.[5]

(ii) *The influence of some of the characteristics of the older system of pleading.*

Both the older and the newer modes of pleading were oral. "You are not in Court Christian," said Staunton, J., in 1313-1314 "where everything you plead must needs be in writing;"[6] and

[1] As Reeves says, loc. cit., where an issue depended upon two affirmatives it was difficult to decide the venue from which the jury must come.

[2] Reeves, H.E.L. ii 627; as he says, "There seems to be this sort of affinity between an argumentative plea and a negative pregnant; that as the latter is a negative pregnant with an affirmative, so is the former an affirmative pregnant with a negative; and the cure for both is in most cases to add or substitute a direct denial of the substance of the plea or declaration which is to be answered."

[3] Ibid; see p. 628 for some exceptional cases in which a double plea was allowed.

[4] Ibid 628; "You ought to make protestation of the non-tenure and then answer in chief as you are doing," Y.B. 5 Ed. II. (S.S.) (1312) 32 *per* Passeley; see also Y.BB. 6 Ed. II. (S.S.) 170; 8 Ed. II. (S.S.) 122, 123, 125; 20 Ed. III. (R.S.) i 292.

[5] Reeves, H.E.L. ii 629, gives the following instance, "A tenant pleaded a devise to himself; the plaintiff replied that the devisor was an infant; the tenant rejoined that infants might devise by custom; this was held a departure from his plea; which alleged a devise generally."

[6] The Eyre of Kent (S.S.) ii 25.

many of the fundamental rules of the common law system of pleading were made for and adapted to this system of oral pleading. "The abandonment of the practice of oral pleading," says Stephen,[1] "led to no departure from the ancient style of allegation. The pleading has ever since continued to be framed upon the old principles and to pursue the same forms as when it was merely oral. The parties are made to come to issue exactly in the same manner as when really opposed to each other in verbal altercation at the bar of the court; and all the rules which the justices of former times prescribed to the actual disputants before them are as far as possible still enforced" with respect to the later written pleadings. And this system of oral pleading had one great advantage over the later system of written pleadings. It made for far greater freedom in the statement of the case. A painful accuracy was no doubt required in the wording of the writ and count,[2] in the correspondence between writ and count, and in the observance of the elaborate rules of process. But when all objections to the writ and process had been disposed of, and when the parties were fairly before the court, the debate between the opposing counsel, carried on subject to the advice or the rulings of the judge, allowed the parties considerable latitude in pleading to the issue.[3] Suggested pleas will, after a little discussion, be seen to be untenable; a proposition to demur will, after a few remarks by the judge, be obviously the wrong move. The counsel feel their way towards an issue which each can accept and allow to be enrolled.[4] In fact, in the earlier part of this period it was not the strictness of the rules of pleading which hindered justice, it was rather the strictness and elaboration of the rules of process.

This looseness in the rules of pleading was increased, perhaps almost necessitated, by the fact that the law of evidence, as we understand it, hardly as yet existed. So far are we from the rule of later law that evidence must not be pleaded, that we might almost say that oral evidence was generally brought to the notice of the court by pleading it.[5] One or two instances (*a*) of the

[1] Pleading (5th ed.) 29.

[2] "It may happen in their case as it happened here in Brompton's time in the case of a poor woman who brought a writ and counted through a woman who had committed felony. And on this point she was challenged, and the whole court had pity on the poor woman; and yet she could not be helped, though if she had omitted the woman guilty of felony, her writ would have been good," Y.B. 3, 4 Ed. II. (S.S.) 33-34 *per* Bereford, C.J.

[3] "It is not right that every word a man says should bear force," *per* Bereford, C.J., Y.B. 3, 4 Ed. II. (S.S.) 42.

[4] Y.BB. 3 Ed. II. (S.S.) lxvi-lxviii; 3, 4 Ed. II. (S.S.) 50, 134, where it is clear that the pleadings were entered after discussion; 5 Ed. II. (S.S.) (1312) 195—"*Toudeby.*—We have pleaded to the issue of the plea, and the parties have a day and are gone away, etc. *Bereford*, C.J.—We are not recording this plea, and it is for us to see if this issue be receivable by law."

[5] Thayer, Evidence 114-115.

freedom of action allowed to counsel under this system of pleading, and (*b*) of the manner in which evidence was brought before the court, will illustrate some of the salient characteristics of the system of pleading as used in this period.

(*a*) Instances of the mode in which an issue was reached by discussion at the bar under the superintendence of the court will be found on almost every page of the Year Books. As a simple illustration I will take a case of the year 1309.[1] "Alice brought her writ of entry *sur disseisin* against a Prior, and counted on her own seisin as of fee and of right in time of peace, saying, 'Into which the Prior has no entry save after (*post*) the disseisin which one *G* did to Alice.' *Passeley.*—'She was never seised of fee and of right in such wise that she could be disseised.' *Stanton*, J.—'That is no good answer in this writ, but it would be a good answer to say that *G.* did not disseise her.' *Friskeney* argued that Passeley's answer was receivable because, if the plaintiff's count claiming as of fee and of right were accepted by them, they might be estopped in any subsequent proceedings from denying that she held as of fee and of right. *Stanton*, J.—'What you say is wrong. What enrolment are we to have in this case? I think it should be, "not so seised that she could be disseised," so your averment is not receivable.' *Passeley.*—'The enrolment shall be, "not so seised in such manner as she demands so that she could be disseised."' To this all agreed." When an answer had been given counsel would sometimes go out to imparl in order to consider the new facts, probably in consultation with their clients, and would then give a reply.[2] The court would sometimes warn counsel of the risk of abiding judgment on his plea.[3] Sometimes it would suggest a plea to meet difficulties suggested by counsel in argument;[4] and the fact that the court advised a particular mode of pleading was once stated as a reason why counsel adopted it.[5] But sometimes the court was only wise after the

[1] Y.B. 2, 3 Ed. II. (S.S.) 136, 137; cp. Y.B. 6, 7 Ed. II. (S.S.) 20, 46-48 for other illustrations.

[2] Y.BB. 3, 4 Ed. II. (S.S.) 44; 6 Ed. II. (S.S.) 220; 20 Ed. III. (R.S.) ii 34.

[3] "*Bereford*, C.J.—Do you want to abide judgment? *Scrope.*—Take our words just as we say, and we shall abide willingly. . . . *Bereford*, C.J.—Take good care for you can have one meaning and perhaps we may have another."

[4] Y.B. 18 Ed. III. (R.S.) 152, *Sharshulle*, J., "For that matter I should hold him to be a foolish pleader if he pleaded to the demandant's action within the liberty, but he would say that he ought not to answer there because the tenements are outside the liberty, and upon that he ought to abide judgment, whereupon, if judgment were rendered against him, he would have the Assize;" Y.B. 19 Ed. III. (R.S.) 164 a plea is settled by the court; and see Y.B. 3, 4 Ed. II. (S.S.) 88, and 121 *per* Bereford, C.J.

[5] Y.B. 11, 12 Ed. III. (R.S.) 88, *Trewith*, after some pleading, seeing that the court was against the writ, demanded that it should abate. "You shall not get to that," said *Parning;* "you have pleaded higher, and thereby affirmed the writ as good." "I vouch the record of the roll," said *Trewith*, "that it was not of my own accord, but by the advice of the court."

event, and delivered a lecture upon what, in its opinion, would have been the proper mode of pleading.[1] Counsel once argued that what a party has pleaded and passed over without notice by the court is wholly immaterial; and though the court denied the proposition as thus broadly stated, there was probably a considerable element of truth in it.[2] A survival of the old idea that a pleader's words were not binding till avowed by his client or attorney no doubt made it the more possible to treat pleas as capable of amendment till one was reached by which counsel would abide.[3] Whether or not this was so it is quite clear, as Reeves says,[4] that everything advanced by counsel was, in the first instance, "treated as matter only *in fieri* which upon discussion and consideration might be amended, or wholly abandoned, and then other matter resorted to, till at length the counsel felt himself on such grounds as he could trust. Where he finally rested his cause, that was the plea which was entered upon the roll, and abided the judgment of an inquest or of the court, according as it was a point of law or fact." In 1388 there was a dispute as to whether a plea pleaded two weeks before had been entered on the roll. It had not been entered; "and the Justices said that they would not record so strictly, and said that if they ought to record every manner of plea that was pleaded at the bar, that their record would be too hard."[5] We may note, too, that the complications of process sometimes gave to a pleader a chance of correcting an error which might otherwise have proved fatal. If the case were put without a day by a protection, or, perhaps, by a default, the pleading must begin anew; and mistakes made on the occasion of the first pleading could then be amended.[6]

[1] Y.B. 14 Ed. III. (R.S.) 60, *Scrope* was on the bench and said: "What you say as to two bastards you say well, but, in God's name, you might have saved yourself against her by way of replication . . . and this replication must have been entered on the roll."

[2] Y.B. 11, 12 Ed. III. (R.S.) 42, *Trewith*, "Whatever thing a party may plead and pass over without regard of the court and join issue on a plea, then nothing shall be recorded except the issue; for of that which was spoken and pleaded before and waived without award, nothing shall be entered on the roll;" *Hillary*, J., "You say wrong;" Y.B. 3 Ed. II. (S.S.) 129, *Bereford*, C.J., "You did not demur there. So you cannot take advantage of that;" cp. Y.BB. 3, 4 Ed. II. (S.S.) 42, cited above 635 n. 3; and 19 Ed. III. (R.S.) 332, where counsel is allowed to amend the count, because no exception had as yet been taken to it.

[3] Y.B. 3 Ed. II. (S.S.) 129 and Introd. lxvi, lxvii; "*Trew.*—Demanda si lour attorney ne voleit ceo que *Kels.* avoit dist, et l'attorney luy avowa," Y.B. 7 Ed. III. Pasch. pl. 15 (p. 17); and see Y.B. 6, 7 Ed. II. (S.S.) xx for other illustrations.

[4] H.E.L. ii 223; cp. Y.B. 18, 19 Ed. III. (R.S.) 486.

[5] Y.B. 12 Rich. II. 19.

[6] Y.B. 3 Hy. VI. Pasch. pl. 10, Formedon against J and A his wife; the demandant counted against them on a gift in tail made by deed to the ancestor of the demandant. Paston by mistake said by virtue of which the *donor* was seised, whereas he should have said *donee;* the husband made default then and at the petite cape; the wife prayed to be received to defend her title, and relied on the faulty count. Paston offered to plead anew, and he and Martin argued that this could be done; Babington contra; *Cokain* agreed with Paston and Martin, putting

(*b*) The law knew the preappointed witness to deeds or charters: it knew also the written evidence of the deeds, fines, or other writings.[1] It did not as yet recognize the independent witness called to testify to the facts of which he had knowledge; indeed, as Thayer has shown, the strictness with which the laws against maintenance were interpreted effectually discouraged him.[2] The evidence, which in modern times is given by such witnesses, was at this period supplied partly by the jury, which the law was careful to draw from the neighbourhood of the occurrence,[3] partly by the custom of pleading such evidence. For this reason questions turning upon the "venue" of the jury are of much importance in the Year Books; and for the same reason counsel deem themselves to be in a manner responsible for the statements which they make to the court. They examine their clients before they put forward a plea.[4] They even decline to plead a fact as to the truth of which they have doubts.[5] Sometimes, indeed, we see a distinction taken between the plea and the evidence for the plea when it is convenient to say that a statement is only evidence and not really a plea.[6] But, as a general rule, it would be true to say that such distinct things as the pleadings, the statements of counsel, and the evidence for those statements are rarely distinguished in the Year Books.[7] To this state of things must be ascribed some peculiar doctrines in the law of pleading. It was clearly difficult under these circumstances to bring to the notice of the jury, who knew something of the facts, the exact import of similar yet legally distinct states of fact—especially having regard to the rule that, if the special facts really only amounted to the general issue, the general issue only could be pleaded, and the case therefore necessarily left to the jury. It was equally difficult to separate clearly matters of fact from ques-

the case of a protection and a resummons, "Mettons que apres le count le parol uste este mis sans jour per protection, et ore le demandant ust sue resummons envers le tenant, ne duist le demandant or count de novel? j o dis que si pur ceo que parol serra my sans jour pur ceo fuit le p emier count alle et detern ine: et en resommons il serra pris sicome nul count ust jamais, et sicome il n'est jamais eu nul auter breve devant eyant regard al count; Sic hic;" cp. Y.BB. 6 Ed. II. (S.S.) i 1-6; 5 Hy. VII. Trin. pl. 4—this shows how conceivably rules of process might be used to save the consequences of an otherwise fatal error.

[1] See Y.BB. 6, 7 Ed. II. (S.S.) 210—note from the record; 6 Ed. II. (S.S.) 199—a fine; ibid 235—a writing.

[2] Thayer, Evidence 125-129; vol. i 334-335.

[3] Vol. i 332.

[4] Y.B. 14 Ed. III. (R.S.) 248.

[5] Y.B. 38 Hy. VI. Pasch. pl. 13; below 646; it is only occasionally—e.g. as to the question whether a given person is alive, that proof must be made by witnesses and not by averment, Y.B. 6, 7 Ed. II. (S.S.) 59; vol. i 304-305.

[6] Y.B. 14, 15 Ed. III. (R.S.) 346; and see Y.B. 3, 4 Ed. II. (S.S.) 51.

[7] See Longo Quinto 58 cited Thayer, Evidence 133, 134; in Y.B. 6 Ed. II. (S.S.) 198 *Scrope* states facts in evidence to the Assize; and in Y.B. 6, 7 Ed. II. (S.S.) 77 *Scotre* does the like; on the other hand, in Y.B. 6 Ed. II. (S.S.) i 51, 52, 54, a distinction is drawn between the evidence and the pleading.

tions of law under a system in which the evidence for the facts stated in the pleadings and the arguments of counsel were all involved in the pleadings themselves, and only extricated gradually in the course of the discussion which settled the issue to be tried. To these difficulties are due the doctrine of colour in pleading[1] and the demurrer to evidence.[2] Both these doctrines were due to a desire to withdraw the case from the jury and to submit it to the court, in cases in which it was thought expedient to have a clear decision upon the legal consequences of certain states of fact. The older modes of proof necessarily gave a "general verdict;" and it was equally possible for the jury, which had stepped into their place, to return a general verdict. Under a system which prevented the judge from clearly directing the jury as to the points of law involved in the case, the growing complexity of the law made it very dangerous to allow the jury to return such a verdict. Therefore these methods were devised for ousting the jury, and for getting a point of law decided by the court. Both these doctrines lived on in the law long after their original *raison d'être* had disappeared. Neither can be understood, unless we understand the peculiar difficulties involved in the conduct of a case in court according to the system of pleading recognized in the fourteenth and fifteenth centuries.

We must now turn to the history of the process by which this oral system of pleading in court gave place to the later system of written pleadings exchanged by the parties or their attorneys out of court.

(2) *The introduction of written pleadings and its effects.*

Towards the close of this period this system of oral pleading began to be superseded by the system of written pleadings, which,

[1] For this doctrine see Thayer, Evidence 118, 119; Reeves, H.E.L. ii 629-632. Suppose, says Reeves, A enfeoffed B of land, and an assize was brought by a stranger against B, B could not plead these facts simply, as such plea would amount only to the general issue; he would be obliged to plead the general issue, and the case would be left to the jury. He, therefore, by a wholly fictitious averment, gave the plaintiff *colour*, i.e. a prima facie cause of action. Thus, after pleading that A had enfeoffed him, he would further plead, "that the plaintiff claiming by colour of a deed of feoffment made by the said feoffor, before the feoffment made to the said tenant (by which deed no right passed) entered, upon whom the said tenant entered." This left a point of law for the court, i.e. the validity of the alleged first deed, and thus the case was withdrawn from the jury; for an illustration see Y.B. 3 Ed. II. (S.S.) 156; and for a later illustration see Corbet's Case (1600) 1 Co. Rep. at f. 79a; for the history of this doctrine see Bk. iv Pt. II. c. 7 § 2.

[2] This is explained by *Eyre*, C.J., delivering the opinion of the judges to the House of Lords, in Gibson and Johnson v. Hunter (1793) 2 Hy. Bl. 187, at p. 206: "If the party wishes to withdraw from the jury the application of the law to the fact, and all consideration of what the law is upon the fact, he then demurs in law upon the evidence, and the precise operation of that demurrer is to take from the jury, and to refer to the judge, the application of the law to the fact;" for an illustration see Reniger v. Fogossa (1552) Plowden at p. 4.

when complete, were entered on the record. The practice in its final form is thus described by Stephen:[1] "The present practice is to draw them (the pleadings) up in the first instance on paper, and the attorneys of the opposite parties mutually deliver them to each other out of court . . . these *paper pleadings* at a subsequent period are entered on record." This change, it may be said, is merely a mechanical change; but, as Maine has noted,[2] in reference to another change of a similarly mechanical character—registration of title—the effect of such a change on the fabric of the law may be considerable. This particular change had in fact very large effects upon the conduct of litigation; for it helped to distinguish between the nature of various acts and the duties of the actors which had never been clearly distinguished under the older system. Owing to it, it became more possible to distinguish the pleading which defines the issue from the explanatory statements of counsel and their arguments upon points of law on the one side, and from the evidence for the facts pleaded or stated on the other. This differentiation of functions had considerable effects upon the manner in which the law was developed in later centuries. In the first place, I shall say something of the manner in which these changes were brought about, and in the second place, I shall summarize their effects.

(i) *The change from oral to written pleadings.*

The stages by which this change was brought about are somewhat obscure, and probably they will never be quite clearly ascertained; for we shall see that it was gradually effected by means of a number of small changes in the practice both of the courts and of the offices of the courts. But small and gradual modifications of the practice of a court or an office rarely get into the books. They are learnt by the practitioners whom these changes concern, and the rules are so obvious to them that it hardly seems necessary to state them. Thus by a series of small changes, spread over perhaps a couple of centuries, a very different practice will be established. But the change will have been made so gradually, and spread over so long a period, that all accurate memory of the stages by which it has been effected will soon be lost. All that the books will contain will be a note of the change made and an occasional conjecture as to its causes.

The modern practice according to which the attorneys of the parties delivered paper pleadings which were subsequently entered on the record, is so obviously different from the old fashion of oral pleading which has just been described, that it might almost be supposed that the two systems had very little relation to each

[1] Pleading (5th ed.) 27-28.

[2] Early Law and Custom 357.

other. But they are in fact intimately related. We have seen that most of the fundamental rules applicable to these written pleadings were originally devised for the older system of oral pleading; and that some of the rules were much better suited to the earlier than the later system.[1] Similarly the style in which the later written pleadings are drawn up obviously originated in the days when pleadings were oral, and entered on the plea roll as the case proceeded. They "pursue the style in which the record itself was drawn up. Like it they are expressed in the third person—and state the form of action, the appearance of the parties, and sometimes the continuances and other acts and proceedings in court. They are framed, in short, as if they were extracts from the record—though the record is by the present practice not drawn up till a subsequent period, and is then a transcript from *them*." [2] Similarly the title of the earliest collections of precedents in pleading—The Books of Entries [3]—tell the same tale. It is clear, then, that the two systems are intimately related; and the intimacy of the relation is a sure indication that the change is the result of a series of small changes in practice extending over a long period.

We shall see that the remote beginnings of the change must probably be dated from the early years of the fifteenth century; and that the tendency of the practice of the courts was making towards this change during the rest of that century. But we shall see that it was not fully accomplished till the sixteenth century; and that its full accomplishment owed something to the extensive changes in law and practice which came with that century. I shall therefore divide the history of this subject into these two periods, and shall deal (*a*) with the beginnings of this change in the later part of this period; and (*b*) with its completion in the sixteenth century.

(*a*) It is probable that the earliest modification of the system of oral pleading was occasioned by a growth in the technical strictness of the rules governing the form of the pleadings. That these qualities had begun to mark the pleadings of the early years of the fifteenth century is noted both by Coke and Hale. They agree that the art of pleading had approached perfection in the reign of Edward III. It was more exact than in the reign of Edward I., and it had not acquired the vices of technicality and prolixity which characterized it in later ages.[4] But from the reign of

[1] Above 633, 634, 635, 638-639.

[2] Stephen, Pleading (1st ed.) 35.

[3] For these see Bk. iv. Pt. I. c. 5.

[4] "In the reign of Edward III. pleadings grew to perfection both without lameness and curiosity . . . and therefore truly said that reverend justice Thirning in the reign of H. 4 that in the time of E. 3 the law was in an higher degree than it had been any time before; for (saith he) before that time the manner of pleading

Henry VI. onwards Hale notes a deterioration. "Though pleadings in the times of those kings (Henry VI., Edward IV., and Henry VII.) were far shorter than afterwards, especially after Henry VIII., yet they were much longer than in the time of king Edward III.; and the pleaders, yea and the judges too, became somewhat too curious therein. So that that art or dexterity of pleading, which in its use, nature and design, was only to render the fact plain and intelligible, and to bring the matter to judgment with a convenient certainty, began to degenerate from its primitive simplicity, and the true use and end thereof, and to become a piece of nicety and curiosity."[1] The Year Books of these three reigns bear out Hale's statements. A large number of cases turned simply on matters of form.[2] A case of 1461 shows that the court sometimes consulted the prothonotaries as to the proper form of a plea;[3] and no doubt a form of plea which was sanctioned after such a consultation would easily harden into a fixed rule.[4] The same case of 1461 shows that the judges were reluctant to depart from a precedent laid down in the Novæ Narrationes, though apart from this precedent they would have come to another conclusion.[5] This indeed is prophetic of the rigidity which will be introduced when the system of written pleadings is fully established; but as yet this is in the future.

It is clear, however, that this growth of formalism was making it increasingly difficult to maintain the old system of oral pleading in its original form. Counsel could not be expected to compose and speak an elaborate plea on the spur of the moment. The difficulty was met, as Reeves has pointed out,[6] by a modification in the manner of recording pleas on the rolls. The court did not, as we have seen, treat as conclusive anything said by counsel un-

was but feeble in comparison of that it was afterward in the reign of the same king," Co. Litt. 304b; "the judges and pleaders were very learned, and the pleadings are somewhat more polished than those in the time of Edward I. Yet they have neither uncertainty, prolixity, nor obscurity. They were plain and skilful . . . so that at the latter end of this king's reign the law seemed to be near its meridian," Hale, H.C.L. (6th ed.) 198-199.

[1] H.C.L. 211-212; to the same affect Co. Litt. 304b.

[2] Reeves, H.E.L. ii 619-653; at p. 620 he says: "Almost everything substantial in pleading, which was practised from this time down to the present, was settled by judicial determinations in the reigns of these kings."

[3] Y.B. 39 Hy. VI. Mich. pl. 43 (p. 30); cp. Y.B. 2 Ed. IV. Mich. pl. 14 for another case in which the prothonotary testified as to the usual course of pleadings.

[4] For other illustrations see Longo Quinto pp. 22, 23; Y.B. 33 Hy. VI. Mich. pl. 40; for cases in which the clerks either ask or give advice in matters of process or pleading, see Y.BB. 11, 12 Ed. III. (R.S.) 426, 434; 13, 14 Ed. III. (R.S.) 258, 310; 14, 15 Ed. III. (R.S.) 74; 20 Ed. III. (R.S.) ii 512.

[5] Y.B. 39 Hy. VI. Mich. pl. 43 (p. 30).

[6] H.E.L. ii 621-622; as Reeves points out, ibid 398-399, the view expressed by Gilbert, Origins of the King's Bench (ed. 1763) 315, that the system of paper pleadings originated in the statute of Edward III. which required pleadings to be in English, vol. ii 477-478, rests on no evidence.

less it was entered on the roll ;[1] and even if a plea were entered on the roll, the roll might be amended the same term,[2] or perhaps even later with the leave of the court,[3] provided final judgment had not been given.[4] Thus before a plea was entered on the roll there was sometimes a friendly discussion as to its form ; and then the opposing counsel promised an answer on the following day.[5] When the plea was enrolled the copy of the roll was probably available to the pleader on the opposite side, who, after consideration, made his reply.[6] It is probable, therefore, that Reeve's account of the manner of recording pleas which prevailed in the fifteenth century is substantially correct. He says :[7] "Whether it (the declaration) was drawn out . . . on paper or parchment by the party's counsel, and delivered over to the adversary's counsel, or, what is more probable, was entered, in the first instance, upon the roll of the court, it is not easy to determine with precision : in point of effect it would be the same ; for the roll might be amended by leave of the justices, during the term in which the declaration or plea was entered, and it must, at any rate, be entered on the roll, as of that term ; in both of which cases the roll became afterwards, in construction of law, a record : so that the power the justices exercised over the roll during the term is, on the one hand, sufficient to show the possibility of making the amendment of pleas without resorting to the supposition of there being paper pleadings ; and the different construction the judges put upon the same roll of parchment, after and during the term, satisfies us that to constitute a record there was not required a transcript from any less solemn paper or parchment to one that was more so. . . . It seems, therefore, a reasonable conjecture that whenever pleadings *ore tenus* went out of use, it became the practice for the counsel to enter the declaration or plea upon the roll in the office

[1] Y.B. 12 Rich. II. 19, cited above 637.

[2] "And note that after the adjournment the roll was amended on the prayer of the tenant, when the demandant had gone with his day, because the justices recorded that the roll did not accord with the plea," Y.B. 16 Ed. III. (R.S.) i 64.

[3] In a letter of 1469 to Sir William Plompton there is the following passage: "Also (I have sent you) the copie of the pleadings betwixt you and the minister for your milne at Plompton ; it were well done that ye had a speech with Mr. Middleton of the forme of the pleadings, and of the matter both of the title of his milne, and your milne, and of the freeholdes of both sides the water, for that your counsell may have instruccion thereof: it hath cost you money this terme, and yett no conclusion but to change the pleadings the next terme at the pleasure of the parties." In later law if it was desired that no alteration should be made on the roll a "recordatur" was entered that the record was not altered, and then any alteration made after could be disregarded ; but this was superseded by making a rule of court that no alteration should be made, Birt v. Rothwell (1698) 1 Ld. Raym. at p. 211.

[4] Y.B. 20 Ed. III. (R.S.) i 328. [5] Longo Quinto 35.

[6] See Y.B. 21 Ed. IV. Mich. pl. 4 (p. 43), "Lendemain le pleintif en breve d'Error vient in propre person et pleda ce plea en la forme ensuant 'ye have here, etc.—en Englois [then follows the Latin entry on the roll giving the effect of the plea]. A auter jour *Catesby* monstra tout le plea que il ad plede n'est pas bon."

[7] H.E.L. ii 621-622.

of the prothonotary; that the counsel of the other party had access to it, in order to concert his plea or to take his exceptions to it; and that when these were to be argued, the roll was brought into court, as the only evidence of the pleading to be referred to. This course was certainly attended with some difficulties, and led to the expedient of putting the pleadings into paper, and handing this paper from one party to the other, the entry on the roll being deferred till the end of the term."

It would seem that in the latter half of the fifteenth century this practice of entering the plea on the roll in the office of the prothonotary, and the power of the court to amend the roll, were giving rise to a practice of leaving a note of the plea with the prothonotary who, after verdict, entered up the record. We shall see that the prothonotaries and their clerks were constantly employed in drawing up pleas in proper form.[1] Mr. Hall has pointed out[2] that it is evident "from an inspection of the certified 'Records' of Civil Pleas as late as the close of the fourteenth century that in the hands of an experienced prothonotary, the briefest memoranda were sufficient for the purpose of reconstructing the conventional pleadings upon a formal writ or bill. The notes made for this purpose were endorsed on the several instruments by which process was effected, and then, even if the Roll of the year and term were not available, these could be expanded at pleasure in the form of conventional pleadings after the lapse of many years." It was therefore natural that some of the prothonotaries should consider it more convenient to note the pleadings as they were delivered and settled, and then, when the case was finished, enter up the roll. Thus in 1461 Widslad, one of the prothonotaries of the Common Bench, said that "he was never accustomed to make a record of anything or of any plea before the Assize had given its verdict, and then he used to make the whole record, and that he used to enter no plea of the other days though the Assize had remained (without giving its verdict) for two or three years (unless he were specially asked by the plaintiff to enter the record for any special reason); but on the first day he only entered the plaint on the back of the writ; and he said that it was the usual course pursued by his master Brown who was prothnotary before him."[3] Similarly in another case in the same year it seems that

[1] Below 645.

[2] Studies in English Official Historical Documents 325-326.

[3] "Widslad dit que il ne unques usoit a faire ascun record dascun chose, ou dascun plee devant que l'Assise soit passe, et donques a faire le record entier, et rien plee de les auters jours coment qu l'Assise avoit remanie ii ou iii ans (sinon que il soit especialment requis per le pleintif pur especial cause) mes tantsolement a le primer jour pur entrer le pleint sur le dos del breve: et il disoit que ce fuit common cours ove son Maistre *Brown* qui fuit protonotary devant luy meme," Y.B. 39 Hy. VI. Mich. pl. 22.

there had been two entries of the same case. In one the count, the plea, and the continuance had been entered; and in the other, which had been made up after verdict, the whole case had been entered anew in another term.[1]

This practice of making the formal entry at the close of the case from the notes of the pleadings in the prothonotary's office brings us a good deal nearer to the modern practice; and we shall see that it was adopted in the seventeenth century.[2] But it was not as yet established. In fact it was disapproved by the judges. In the first of these cases Markham said it was a bad usage which originated in the laches of the clerks;[3] and the other prothonotaries, Comberford and Copley, agreed that the proper thing to do was to enter up the record day by day as the case proceeded; and this was approved by the Court.[4] In the second of these cases it was the first entry which was regarded as authoritative.[5] The judges still held to the view that the pleadings must be settled by oral discussion at the bar. No doubt the plea was put into writing, and then discussed—the growth of formalism in pleading had made this necessary. But the final form of the pleadings, and therefore the issue to be tried, were still settled by this oral discussion at the bar. We shall now see that it is to cases when the parties appeared, not by counsel, but in person or by attorney, that we must look for a further modification in the direction of the later system of written pleadings.

If a litigant appeared in person or by attorney he or his attorney must draw his pleadings. But in such cases it is probable that his plea would need to be put into formal shape. In such cases, it would seem, it was the prothonotaries or their clerks who were employed to do this work; and it was doubtless for this reason that it was customary for the parties to employ them as their attorneys. In 1392-1393 the Commons complained that these clerks purposely garbled the pleadings entered on the rolls in the interests of their clients;[6] and in 1410 the Commons

[1] "*Choke* Sir il y ad ii rolles: un rolle en quel le count et le plee et certein continuance fuit, et le rolle qui il ad mise avant qui fuit fait quand le verdict fuit passe, et la fuit tout l'entier matter entre *de novo* a *auter Terme*. Et en le primer rolle la il est *qui heir il est*, et coment que le clerk ad entre-lesse en son novel rolle ce sera amend pur ce qu'il est forsque misprison del clerk. Et le primer rolle fuit veu, et fuit come *Choke* disoit. Purque le ii rolle fuit amende per *advis de tout le Court*," Y.B. 39 Hy. VI. Mich. pl. 43 (p. 31).

[2] Below 652-653.

[3] Y.B. 39 Hy. VI. Mich. pl. 22.

[4] Comberford thought that the practice was not quite settled, but "il est bon guide a faire le record chescun jour de ceo qui est fait;" Copeley was more definite, and said that he always "use a faire son record chescun jour de ceo que est fait a ceo jour, et touts dits ad use. Et les Justices disoient que ce fuit bien use, que issint covient estre fait."

[5] Above n. 1.

[6] "Item priont les Communes, que come plusors Clercs de Bank le Roi, Commune Bank, et Clercs d'Assises, que escrivent les Records et Plees perentre partie et

petitioned that no filazer of either bench or prothonotary be an attorney. This petition was declined, and it was declared that they should continue to act as attorneys as heretofore.[1] Their close connection with the pleadings of persons not represented by counsel is more directly shown by an order made by Prisot, C.J., and the other judges of the Common Bench in 1457 as to the fees payable to the prothonotaries.[2] For every "comen declarcayon, comen Plee in barre, comen replycacyon, and comen rejoinder in Plees personel," where the litigant appears in person or by attorney the fee is to be 13s. 4d.; but for personal pleas pleaded by a serjeant it is only 2s. This shows pretty clearly that the prothonotaries or their clerks, acting as attorneys drew, or acting as clerks put into shape, the pleadings of persons not represented by counsel. As we shall now see, it is in connection with pleas thus drawn or put into shape that we get a stage nearer to the written "paper" pleadings of the modern law.

It is in 1460 that we get perhaps the first and certainly an early mention of a "paper" pleading.[3] The tenant and his attorney in a writ of right had made default at *nisi prius*. The judges had recorded this default, and discharged the jury. In the Easter term the tenant came to the bar, and his presence was recorded. Thereon Billing and Laicon, counsel for the demandant, prayed judgment against the tenant. Choke and Littleton were counsel for the tenant; and the tenant requested them to plead the fact that while coming to the former trial he and his attorney had been stopped by floods, in order that by this plea his former default might be saved. But these floods were alleged to have been in the county palatine of Durham and another county; and the serjeants knowing nothing of the matter, and apparently suspecting the truth of these statements, declined to plead them. "Wherefore the tenant went to Comberford, the prothonotary, and prayed him to make him a paper upon this matter, which he did; then he came with the paper to Choke at the bar, and prayed him to put it in to the court, and he did so by his command without pleading it, or seeing what was in the paper; and the paper remained with Copley, another prothonotary, because he had the entry of the matter before."[4]

partie, sont Attournes ove l'une partie ou l'autre, et issint favorables en lour escrive, a grant meschief, damage, et desheriteson de vos leges," R.P. iii 306 (16 Rich. II. no. 28).

[1] R.P. III. 642-643 (11 Hy. IV. no. 63).

[2] Praxis Utriusque Banci (ed. 1674) 28.

[3] Y.B. 38 Hy. VI. Pasch. pl. 13.

[4] "Pourquoi il ala a Cumberford protonotary et pria que il voille faire a luy papier de ceo matter; que fait issint; et puis il vint ove le papier et la prist a Choke a le barre, et luy pria a getter ceo en le court, et issint il fist per son commandement sans pleder ou sans voier que fuit deins le papier, et cest papier, demour ove Copley un auter protonotary pur ceo que il avoit l'entrie de le matter a devant."

Billing and Laicon then moved for judgment, commenting upon the character of a plea so suspicious that even the tenant's own counsel would not plead it. Choke and Littleton then tried to excuse the tenant; but Prisot, C.J., said to them: "You will get no worship by meddling with these false and suspicious matters; for this and suchlike business will get no favour here. It is not the practice to put in such papers when the party is represented by counsel without pleading them at the bar openly; for if this be allowed we shall have several such papers in time to come which will come in under a cloak, and matter which a man's counsel will not plead can be said to be suspicious. Then he said to them, If you wish to plead this matter plead it, or otherwise it will be good for nothing. And they replied that they dared not plead this matter, knowing nothing of it except what the tenant told them; and they said that they did not wish to meddle any further with it." [1]

There was then some further discussion, and Moile, J., gave it as his opinion that since the serjeants would not plead for the tenant, the tenant could do nothing else but go to the prothonotary and get a paper drawn up and plead the matter in this way.[2] After further discussion on other days, it was finally settled "that the plea be recorded in the manner and form in which it is drawn without any amendment; and they charged the prothonotary to make no amendment." Then Billing and Laicon were told to answer to the plea. They demurred to it; and after some further discussion the court told Choke and Littleton to argue the demurrer.

It is clear from this curious tale that a person not represented by counsel could get his plea put into shape and written out on paper by the prothonotary or his clerk; and that he could then put this paper in as his plea. The court did not consider it necessary to speak the plea for such a person, as under the old practice.[3] It is also fairly obvious firstly that, when the plea was put in or spoken, it might be amended before it was enrolled, for a special instruction was given that this extremely suspicious plea

[1] "*Prisot* dit a eux, N'aures unques worship per tiels matters, issint faux et suspecious, car ceo matter n'aura nul favour icy, ne nul tiel; et il n'ad este use cy a mettre eins tiels papiers quand le party ad Consail ove luy sans eux pleder al barre overtement; car si cest point serra suffre nous aurons plusors tiels papiers en temps avenir, que viendra eins desous un cloak, et il puit estre dit suspecious matter que son Consail ne veut pleder. Purquoi il dit a eux, Si voules pleder cest matter, pledez, ou autrement il servira pur rien. Et ils respondent qu'ils n'osent pleder, ne ils ne scavent unques de le matter, mais come il avait dit; et disoient qu'ils ne voillent pluis mesler ove ceo."

[2] "Quand le party fuit icy, et son presence record, et command a pleder, et il vient ove sa matter a son Consail et ils ne voillent pleder le matter pur le suspecion, que poit il donques faire, mes va al' protonotary et fait un papier et le mist eins pur son excuse, n'ad il donques bien fait?"

[3] Y.B. 11, 12 Ed. III. (R.S.) 66, "And because the plaintiff was a poor man and the court itself had spoken the declaration, the defendant was driven to answer,"

was not to be amended; and secondly that as yet the serjeant who pleads a plea takes upon himself some responsibility for its accuracy. This second point is abundantly clear both from the reports[1] and from other sources;[2] and it is clear that throughout this period it made for the retention of the old style of oral pleading. Though Moile thought there was no objection to such a manner of pleading when counsel had declined to plead, Prisot objected on the ground that it would be a bad precedent to allow persons represented by counsel thus to put in paper pleas.

We shall now see that it is a development of this practice of allowing persons not represented by counsel to put in paper pleas settled in the prothonotaries' offices, that gave rise to the modern practice of drawing up paper pleadings, which were exchanged between the attorneys of the litigants, and entered on the roll at the conclusion of the case. But this development does not take place till the sixteenth century.

(*b*) That this development took place in the sixteenth and seventeenth centuries is due firstly and chiefly to the growth of the practice of proving facts by witnesses instead of relying on the statements of counsel. This change was, so to speak, the condition precedent for the further developments which led to the modern system of written pleadings. Secondly, it was due to some extent to the practice of other courts, outside the sphere of the common law, which had long used written pleadings. Thirdly, it was due to the growth in the complexity of the science of pleading. Fourthly, it was due to modifications in the arrangements of the prothonotaries offices, which were occasioned by the greatly increased mass of business with which the common law courts were called on to deal in the latter part of the sixteenth century.

Firstly, it is quite clear that in the course of the sixteenth century the practice of proving by witnesses the facts stated in the pleadings was growing.[3] Probably the earlier half of the sixteenth century was a transition period. Thus in the case of *Reniger v. Fogossa* in 1551[4] the witnesses for the crown apparently made

[1] See e.g. 12 Rich. II. 80 where counsel makes a statement after examining his client; above 638.

[2] Thus in 1475 Sir William Plompton's servant wrote as follows: "As for the suit of Tulis executor, it is delaied for this terme, but the next terme it cannot be delaied; therefore it were well done ye sought up your writtings, and all the sircumstances of making the obligacion, and whear it was made; for there is none will make a plea, without he have some matter to make it of; and also the court will not admit a forreine plea, without the matter be somewhat likely to be true," Plompton Correspondence (C.S.) 30; and see ibid 151-152 for the care taken by counsel to get up the evidence before they pleaded. In 1619 it was held that a counsel was under no duty to sign any pleading put before him by his client, Mingay v. Hammond, Cro. Jac. 482.

[3] Vol. i 335-336; and for the beginnings of the law of evidence see Bk. iv Pt. II. c. 7 § 1.

[4] Plowden 1.

their depositions and were examined upon them in court. On the other hand, the evidence for the defendant was stated by "John Pollard serjeant at law and others learned in the law counsel with the aforesaid Anthony Fogossa."[1] It may be that here, as in other cases, the competition of the Chancery exercised a liberalizing influence upon the doctrines of the common law courts. Persons whose witnesses were frightened by the prospect of proceedings for maintenance applied to the chancellor for a subpœna directed to these witnesses. The witnesses, being thus compelled to testify, ran no risk of proceedings being taken against them; and the Council sometimes intervened to protect them from this or other risks.[2] A statute of 1563 allowed process to issue to compel the attendance of such witnesses;[3] and Sir Thomas Smith regards their presence as the usual accompaniment of a trial.[4] This clearly tends to shift away from counsel the responsibility for the truth of pleas pleaded by him, and to take away Prisot's objection to such paper pleas being put forward by persons represented by counsel. This being so, it would appear that even according to the view of Prisot, and certainly according to the view of Moile, there could be no objection to paper pleadings. We are not, therefore, surprised to find that in the later Year Books of Henry VII. and VIII.'s reigns the questions argued are rather questions as to the form and effect of pleadings already settled, than questions as to the form which the issue shall take; and the same thing can be said of the earlier cases in Dyer's reports. Though in the sixteenth century the court will sometimes give a litigant time to change a faulty plea,[5] or will advise a litigant as to the proper form of plea,[6] though in the seventeenth century oral pleadings were still formally in use in the real actions,[7] it is clear that the practice of settling the pleadings out of court was growing. When Sir Thomas Smith wrote, pleadings could be either written or spoken.[8] But the fact that in 1540 the

[1] Plowden at p. 4.

[2] Stavern v. Bouynton, Cal. i xix, petition to the chancellor for a subpœna to the witness, "for the cause that he shuld noght be haldyn parciall in the same matier;" cp. Select Cases in Chancery (S.S.) no 126; as late as 1590 the Council found it necessary to write to the Judges of Assize for Staffordshire "to take order that for anie matter of evidence that Day gave in against William Stone or Richard Stone' who were accused and charged with foule misdemeanours, they might not be towched anie waie to prejudice or endomage them," Dasent xix. 331.

[3] 5 Elizabeth c. 9 § 12.

[4] De Republica Bk. 2 c. 15.

[5] Russell's Case (1539) Dyer 26b.

[6] See Vivion v. St. Abyn (1554) Dyer at f. 107a, 107b, where the plaintiff pleaded in accordance with the advice of the court; cp. Banister v. Benjamin (1541) Dyer at f. 47b where plaintiff's counsel would not assent to a proposition by the court that he should demur.

[7] Lives of the Norths i 27-28, cited below 655 n. 4.

[8] Bk. 2 c. 12 he tells us that the judges "heare the pleading of all matters which do come before them: and in civill matters where the pleading is for money,

statutes of jeofail were extended to mispleading made not only by the officers of the courts, but also by the parties or their advisers,[1] is some indication that this changed system was making progress; and in 1584 the serjeants in *Dowman's Case*[2] treat the distinction between the pleadings and the evidence for the pleadings as well settled.

Secondly, it may be that in earlier days oral pleadings were known in cases heard before the Council, the Star Chamber,[3] and the Chancery.[4] But in the sixteenth century both the pleadings and the evidence were written. Both in England and abroad the influence of the procedure of the canon law was making for a written procedure which seemed to be more speedy than the interminable debates for which oral pleading, combined with the technical procedure of the common law, afforded abundant opportunities.[5] Fortunately for the common law it maintained the practice of the oral examination of witnesses, and never adopted the practice of written depositions; but it is probable that the written pleadings used by litigants before the Council, and in the courts of Star Chamber and the Chancery, had some influence on the practice of the common law courts.

Thirdly, the growing complexity of the science of pleading was making it a very special subject, to be learned best in the offices of the prothonotaries.[6] As in the preceding period, the court was sometimes guided by their opinion, and by the practice of their offices.[7] Their clerks were employed by the attorneys to draw up

or land, or possession, *part by writing, and part by declaration and altercation of the advocates the one with the other*, it doth so proceed before them till it do come to the issue which the Latines do call *statum causæ*."

[1] 32 Henry VIII. c. 30; extended by 18 Elizabeth c. 14; 27 Elizabeth c. 5; 21 James I. c. 13.

[2] 9 Co. Rep. 9b—"Evidence shall never be pleaded, because it tends to prove matter in fact; and therefore the matter in fact shall be pleaded; and if that is denied, the evidence is to be given to the jury, and not to the Court."

[3] Prof. Baldwin, Select Cases before the King's Council (S.S.) xli, notes that there was "a gradual change from the oral pleadings of the first half of the fourteenth century to the written pleadings afterwards elaborated;" as he says, ibid cxv, the case of Heyron v. Proute (1460-1463) 110-114, affords a very good example of these written pleadings. I do not think that his assertion, ibid xli, that "the council was slower than the courts of common law to change to written pleadings" can be substantiated.

[4] Baildon, Select Cases in Chancery (S.S.) xxvii, xxviii; see case no. 138, and n. 2 at p. 134.

[5] See Dareste, Nouvelles Etudes D'histoire du droit (3rd series) 293, where, speaking of the Parlement of Paris, he says, "La procédure tout orale du XIVe siècle était très longue, très coûteuse, et le Parlement surchargé pouvait a grand peine suffire à l'expédition des affaires."

[6] Dyer, C.J. (Praxis, Utriusque Banci 42), in his charge in 1567 to a jury of attorneys appointed to enquire into misdemeanours in his court, says that he had himself acted as such a clerk.

[7] Throckmerton v. Tracy (1550) Plowden at p. 163; Burton v. Eyre (1612) Cro. Jac. at p. 289.

the pleadings,[1] and, as we have seen, often themselves acted as attorneys for the parties.[2] At the same time the conduct of the case in court was becoming a very different thing, and demanded very different qualities now that there were witnesses to be examined and cross-examined. The skilful construction of pleadings became a branch of legal learning distinct from the actual laying of the proofs for the pleadings before the court, and the maintenance of their validity in court. The art of the special pleader falls apart from the art of the advocate.[3] The attorney who is brought into close contact with his client collects the facts and the proofs; either he or the special pleader puts them into shape, according to the minute and technical rules of pleading; the serjeant or the apprentice conducts the case raised by the pleadings through the court, maintaining the validity of the pleadings, attempting to prove by his witnesses or documents the issues of fact, and arguing the issues of law.[4]

Fourthly, just as these changes were introducing a differentiation of functions amongst the members of the legal profession, so they introduced changes in the organization and functions of the prothonotaries' offices. In the sixteenth century there was a tendency to adopt the policy outlined by the House of Commons in the latter part of the fourteenth and the beginning of the fifteenth centuries,[5] and to prohibit the clerks in the prothonotaries offices from drawing and entering the pleadings in cases in which they were retained as attorneys.[6] In the first half of the seventeenth century

[1] This comes out very clearly in the additions made in the 1589 ed. of Smith's Republic, see Alston's ed. App. A.; thus in the addition to Bk. 2 c. 1 we are told that "The Protonotaries are the Clerks in Court which . . . doe frame the pleading," while the Attorneys "doe purchase out Writs and Processe belonging to their Clients Cause;" in a new chapter 13, which deals with the King's Bench, we are told that "there are certayne Atturnies belonging to this Court in number as the Protonothorie shall appoint: those are for Plaintiffs and defendants in every cause, and they frame and make the pleadings"—in effect they were therefore nominees of the Prothonotary; in a new chapter 15, which deals with the Common Pleas, we are told that "the Protonotharies are they which after the parties have appeared in court, do enter the matter in suite, and make the pleadings, and enter them;" for a case which turned on the mistake of one of these clerks see Forger v. Sales (1629) Cro. Car. 147-148; the practice was then well established, below n. 6.

[2] Above 645.

[3] Smith, Republic Bk. 2 c. 15 assumes that the trial is distinct from the pleadings; in fact the trial as he describes it has all the modern incidents.

[4] The writer of the additions to the 1589 ed. of Smith's Republic in Bk. 2 c. 1 puts into one class the judges, serjeants and counsellors, and in another the prothonotaries, the attorneys, and solicitors; Greenidge, Legal Procedure in Cicero's Time 148, tells us that at Rome the pleaders (*advocati*) tended to fall apart from the eloquent *patroni*.

[5] Above 645-646.

[6] Praxis Utriusque Banci 40, Orders of the judges of the Common Bench, Mich. 15 Eliz. no. 10, to the effect that no prothonotary's clerk who is an attorney is to draw up "any paper or book of the office" wherein he is a clerk, in a case in which there is special pleading, and in which he is the attorney of the plaintiff or defendant, unless the other side consent,

an attempt was made to separate the office of attorney from that of clerk to the prothonotaries, and restrict the latter to the drawing of pleadings.[1] But, as the seventeenth century proceeded, it is clear that the growing mass of litigation prevented the clerks from being able to attend to the business of private clients. As was the case with the Six and the Sixty Clerks in Chancery, so it was with the prothonotaries' clerks, the business formerly done by them passed to the attorneys employed by the litigants.[2]

It would seem that this change finally took place in the latter part of the seventeenth century, and was first introduced in the court of King's Bench, in which, as we have seen,[3] attorneys appointed by the prothonotary drew the pleadings. "In the court of King's Bench," we are told,[4] "the Declaration used to be drawn from the Bill then filed by the clerks in the King's Bench office who were then many, and did the business therein for the attornies at large, or for those who had not seats there; in like manner as the clerks in the Exchequer of Pleas do now; for these clerks, in right of their being clerks, were called attornies of the court;[5] and no attornies at large, till after the Fire of London, were admitted to file their own pleadings." The court of Common Pleas, it was said, imitated this practice.[6] According to the older Common Pleas practice the plaintiff's serjeant counted *ore tenus* in the same term as the writ was returned. The defendant's serjeant asked leave to imparl, i.e. to delay his answer till the following term. The next term he pleaded, a minute was taken by the prothonotary of his pleading, and copies were made of the entry for the parties that they might see whether the entry was correct.[7] "But, as the business of the court increased, the Prothonotaries found it difficult to manage the business of the court in making those entries; and therefore they permitted the attornies to draw up those pleadings, and leave them in their office to enter occasionally; afterwards to deliver the proceedings in paper to one another, and to pay them for the several entries on passing the Nisi Prius Roll.[8] And from

[1] Praxis, etc. 113, Orders of Hil. 8 Car. I. separated the office of clerk to the prothonotaries and the attorney—the former were to draw the pleadings; the latter were to prosecute and defend actions for clients. We may note that the clerks were to serve six years in the office and belong to an Inn of Chancery.

[2] As to this see Bk. iv Pt. I. c. 8. [3] Above 651 n. 1.

[4] R. Boote, An Historical Treatise of an Action or Suit at Law (1766) 63-64; this book contains some very useful remarks upon and explanations of the old practice, and it may be taken to have embodied the tradition of the period when it was written.

[5] This is borne out by what is stated in the 1589 ed. of Smith's Republic, above 651 n. 1. [6] Boote, op. cit. 66.

[7] Substantially the same account is given by Boote, op. cit. 66, and by Gilbert, Origins of the King's Bench (1763) 314-315.

[8] Boote says, loc. cit. that, "The Prothonotaries in the Common Pleas (and clerk of Nisi Prius in the King's Bench) do pass the records or Nisi Prius Rolls for trial, and are paid so much *per* sheet for so doing, because the Nisi Prius Rolls are supposed to be made up by themselves from the several rolls in their offices;" this is confirmed by North, Lives of the Norths, i 127, cited vol. i 258 n. 8.

these pleadings in paper or in the office the Nisi Prius Roll was made up; and after the verdict they made up the Plea Roll from the Nisi Prius Roll, in order to enter up judgment thereon. This was inverting the ancient practice, for now the proceedings began to run in a new channel. Attornies having gained knowledge and skill from the entries of the Prothonotaries, in common cases drew their own declarations or else used to apply to counsel to do it."[1] It was inevitable that under these circumstances the authority of the "paper book" should increase. In fact, from the beginning of the seventeenth century, the courts had allowed the record to be amended so as to bring it into conformity with the paper book.[2]

Thus we reach the modern system. But, except in the case of common form pleadings, the attorneys rarely drew them. They employed counsel; and we shall see that the complexity of the science of pleading gave rise to a class of special pleaders under the bar.[3] But a reminiscence of the period when the clerks in the prothonotaries' offices drew and entered the pleadings, remained in the fees payable to the prothonotaries and their clerks;[4] a reminiscence of the way in which the attornies had superseded these clerks remained in the allowance made by the prothonotaries to the attornies;[5] and a reminiscence of the earliest period when written pleadings were only allowed to parties not represented by counsel, remained in the rule that it was the attorney and not the counsel who was identified with these written paper pleadings.[6]

(ii) *The effects of these changes.*

In describing these changes I have gone far beyond the mediæval period. Neither the changes nor their effects were fully felt till the latter part of the sixteenth and the seventeenth centuries. I shall here only briefly indicate their effects (i) upon the mechanism of legal institutions, (ii) upon the manner of reporting cases, and (iii) upon the law.

[1] Boote, op. cit. 66-67.

[2] "And the record in another term may be amended by the paper book of the office, for it was the misprision of the clerke in the entering of it, and no fault in the party or his counsel," Blackamore's Case (1611) 8 Co. Rep. at f. 161b; cp. Young v. Englefield (1624) Cro. Jac. 670; Tufton and Ashley's Case (1629) Cro. Car. 144.

[3] Bk. iv Pt. I. c. 8; Boote, op. cit. 108, says, "Special Pleadings may be now said to be a particular branch of the law; and yet how few know its form and niceties? Attornies know but little of the matter; in short they don't pretend to it, for as special pleadings must be signed by counsel, they first get them drawn by some gentleman, who by his practice has gained skill and experience therein, and then get the draught settled and signed by some eminent counsellor, who stuffs it with all the curious and nice matters it may *seem* to want. It is sufficient for an attorney to understand the terms of art used therein."

[4] Above 652 n. 8; vol. i 258-259.

[5] Parlt. Papers (1819-20), ii 214-215.

[6] Above 640, 645-646.

(i) These changes affected the mechanism of various legal institutions. They affected the jury. When the pleadings were drawn up and the issue fixed before the parties came into court, when the evidence was given after the jury had been summoned, it is clear that the character of the jury will change from that of witnesses to that of judges of the facts.[1] When this change has taken place the importance of drawing the jury from the locality of the disputed occurrence will be lessened. Thus many cases turning upon disputes as to venue which we find in the Year Books became obsolete. They affected the court. The practice of summoning witnesses to testify to the court was the direct cause of the growth of our modern law of evidence, and of the growth of new modes of controlling the jury suited to the jury's new position of judges of fact.[2] They affected the legal profession. They introduced a distinction between those who prepared the pleadings and settled the issue, and those who conducted the case in court. It was, as we have seen, in the sixteenth century that the Inns of Court began to refuse to allow attorneys to be called to the Bar.[3] It may be that the new division of duties which these changes introduced helped to accentuate an existing division in the legal profession. The old distinction between the narrator and the attorney[4] was sharpened and perpetuated by a new arrangement of the duties of the profession.

(ii) They affected the style of the law report. We must know the pleadings to understand the argument and the decision; but it is the argument and the decision in which the interest of the case centres. Decisions which turn on mere matters of fact can be eliminated. Arguments or dicta which have no bearing upon the judgment can be likewise eliminated. Thus the modern report is no mere account of conversations between judge and counsel, leading to the formulation of an issue, in which it is difficult to distinguish argument from decision, and decision from dictum; the issue is already defined; and what is reported is the law laid down by the court upon the issue thus defined. Three consequences flowed from this. In the first place, the argument of counsel tends to diminish in importance compared with the ruling of the judge. We need only compare Plowden's or Coke's reports with our modern law reports to see the truth of this. In the second place, it becomes possible to cite a case by name for the decision of a distinct point. The reports in the Year Books are, as I have said, reports of arguments upon legal topics relevant and irrelevant to the issue. One case will often touch upon many

[1] Vol. i 336.
[2] Ibid 342-347.
[3] Vol. ii 505-506; L.Q.R. xxvi 137.
[4] Vol. ii 311-312.

points: there are comparatively few cases which could be cited by name as laying down one particular rule. For this reason the Year Books made excellent material for Abridgments; we could hardly construct from them a volume of leading cases. In the third place, these changes had no small share in introducing the modern view as to the binding power of decided cases. During the latter part of the mediæval period the prevailing tendency had been in this direction.[1] The new style of law reporting emphasized this tendency and gave it its modern form.[2]

(iii) These changes had a great effect upon the law. The newer mode of reporting which was thereby made possible tended to greater precision in the statement of the law—to a greater certainty and fixity in its principles. No doubt the new mode of written pleading led to verbal refinements and subtleties in the statement of the case which too often defeated justice.[3] As Roger North points out, the pleaders were less under the control of the court than they had been in the old days.[4] Perhaps, too, the greater fixity in the rules of law, which rested on the definite authority of well-known decisions, made the law less flexible than it was in the days when the mode of reporting made it necessary to cite discussions of, rather than decisions upon, a given rule of law. These difficulties were felt in the latter part of the seventeenth and in the eighteenth and nineteenth centuries. In the sixteenth and early seventeenth centuries the advantages of clearness and certainty must have been felt by both lawyers and laymen. A case which really settled a point upon which it was possible to cite many conflicting dicta from the Year Books must have been welcome to all. In fact, the separation of such things as the pleadings, the evidence for the statements of fact contained in the pleadings, and the decision, was necessary in the interests of legal development. That the

[1] Vol. ii 542. [2] Bk. iv Pt. I. c. 5.

[3] See Y.B. 3 Ed. II. (S.S.) lxviii. Maitland says of the introduction of written pleadings that, "It forced our common law into a prison-house from which escape was difficult. Instead of being able to ascertain the opinion of the judges about the various questions of law that are evolved in the case, the pleader, without any help from the court, must stake his reputation and his client's fortune upon a single form of words;" this was recognized by Hale, H.C.L. 212; by Boote, op. cit. 107-108; and by Hale's editor Runnington.

[4] Lives of the Norths i 27, 28: "Now the pleadings are all delated in paper, and so pass the offices, and the court knows nothing of much the greater part of the business that passeth through it; and when causes which they call real come on and require counting and pleading at the bar, it is done for form and unintelligibly; and whatever the serjeant mumbles it is the paper book that is the text; and the court as little meddles with as minds what is done of that sort at the bar; but the questions that arise are considered upon the paper book. All the rest of the business of the court is wrangling about process and amendments, whereof the latter had been mostly prevented, if the court (as formerly) had considered the first acts of the cause at the bar when offered by the serjeants."

new system which took the place of the old was perfect no one can assert. But we who saw its latter end, and its gradual reform or abolition, will not be able to do it justice unless we look at it, not from the point of view of our modern needs, but from the point of view of the old system as we see it in the Year Books. Under this new system sprang up the greater part of our modern common law, which in our own day has supplied the material for many excellent codifying statutes. As the Formula in Roman law bridged the gap between the period of the Legis Actiones and the procedure of the later Empire, so our rules of procedure under the régime of the strict law of pleading bridged the gap between the period of the Year Books and the modern Rules of the Supreme Court. In both cases the foundations of the greater part of what is valuable were laid in this intermediate period.

This period in the history of English law—from the Conquest to the close of the Middle Ages—is a variegated period. In the first half of it the conditions precedent for the growth of a common law were created; and the foundations of that law were laid upon a basis of primitive customary rules which were selected, coordinated, and restated by men who had learned in or from the Italian schools of law. In the second half of it many of its distinctive features and principles were settled.

In the first half of this period the history of the law is in close touch with the general history of England. It is impossible to tell the tale of how there came to be a common law without constant reference to those events of political and constitutional history which made a common law possible; and, in this part of my work, I cannot help feeling that I have in a manner trespassed upon the domain of Pollock and Maitland's classic history of English law, which for many a year, perhaps for many a century, must be the foundation and starting-point of any work upon this subject. To a large extent I have but summarized the work of master hands; and I can only plead in extenuation that the trespass was necessary to ensure completeness of treatment. Nor does my debt to that history stop here. "A thing begun is half done," says the proverb; and that history has, as my references show, shed much light upon my path long after the reign of Edward I. I cannot help feeling the inadequacy of much of my work in the second half of this period in those many dark places where that light has failed.

Since Reeves wrote in the eighteenth century no one has attempted to write the legal history of the fourteenth and fifteenth centuries. Materials have been collected, but they have not been coordinated and used to form a continuous narrative; and yet it

is the period in the history of English public and private law which is in some ways the most important of all, because many of its external features and many of its doctrines were then taking their permanent shape.

The outstanding features of English public law in this period are the establishment by the crown of a centralized executive, a centralized judicial system, a firm control over local government, and a representative assembly which, alone among the representative assemblies of the Middle Ages, proved itself to be an efficient organ of government. From the point of view of the later history of England and Europe the establishment of such an assembly was the most important of the features of English public law. Its establishment was largely due to the fact that the lawyers who worked this centralized judicial system had so organized the procedure and developed the powers of this assembly that it had become an integral part of the English system of government, exercising an effective control upon the crown, and guaranteeing in a workable fashion the mediæval ideal of the rule of law. The outstanding feature of English private law is the development of its principles by the legal profession into a logical system. And, whether we look at public or private law, it is essentially the period of the Year Books. They contain a wonderful collection of sound principles acutely applied, much commonsense, and some shrewd mother-wit. Moreover, paradoxical though it may appear to those who have not studied them, they contain, especially towards the end of this period, much modern law. Many principles for which it is customary to cite some modern case may be found in them, sometimes in germ, sometimes explicitly stated. But, as I have said, they are found there mixed up with the intricacies of a procedure which rapidly grew obsolete in the course of the two following centuries, and interspersed in the course of debates which appeared inconclusive to those who, being accustomed to a different procedure and a different style of reporting, had lost the clue to the labyrinth which a knowledge of the old system of procedure supplied.

Much that was obsolete, much that was contradictory, required to be sifted out of the mass of matter contained in the Year Books, and restated in the more definite style of the modern law report, before the ore which they contained could be used. Good work was done by the printed Abridgments. Still better work was done by some of the earliest reporters, by Dyer, Plowden, Croke, and above all Coke. The cases which they reported, or the commentaries which they made, were founded upon the principles which they won from this mine of law; and it was

not till the ground was covered by the growth and increase of the works of the modern reporters that it became possible for the man who wished to be something more than a mere practitioner to neglect the Year Books. "Then are we said to know the law," said Coke,[1] "when we apprehend the reason of the law, that is, when we bring the reason of our law so to our reason that we perfectly understand it as our own." In Coke's day this could only be accomplished by a study of the Year Books. "The reason of our law," is now restated by the modern reports, the study of which is as essential to the modern student as the Year Books were to the students to whom Coke spoke.

Great additions, as we shall see, were made to the fabric of English law by the new world—new not only in a geographical but also in a social and in an intellectual sense—which opened in the following period. That the common law was able to hold the supremacy which it had won, and in varying degrees to impress the mark of its principles upon the new matter thus introduced, was due to this large arsenal of sound principles practically applied, collected by the labours of the mediæval common lawyers. They had welded into one unique system of public and private law the substructure of local custom inherited from the Anglo-Saxon period, the general rules which the great lawyers of the twelfth and thirteenth centuries, inspired by the example of Roman law, had laid down as the practice of the king's courts, and the enacted law which had helped to guide the development of the principles of the law, or had brought it into conformity with the new wants of another age. Though the litigiousness of a partially civilized age, the technicality in procedure which is necessary to an early stage in the history of law, and the collapse of the government which marked the close of this period, often led them to lay down as law rules which assisted to pervert justice; yet, the live practical atmosphere of the law court in which these rules were evolved by the process of keen debate, never let them lose sight of the human needs and frailties for the sake of which those rules were being evolved. Thus, amid much ingenuity which was misdirected, there was much which was well directed; and for better or worse some of its products still colour our minds and govern our lives in this twentieth century.

[1] Co. Litt. 394b.

APPENDIX

I

SPECIMENS OF ORIGINAL WRITS FROM THE REGISTER

A. Real Actions

(1) writs of entry

Rex, vicecomiti Derbiæ salutem. Præcipe A quod juste et sine dilatione reddat B unam carucatam terræ cum pertinentiis in X quod clamat esse jus et hæreditatem suam, et in quod idem A non habet ingressum nisi per B patrem [vel matrem vel alium antecessorem] prædicti B cujus hæres ipse est, qui illud ei dimisit ad terminum qui præteriit, ut dicit. Et nisi fecerit, et prædictus B fecerit te securum de clamore suo prosequendo: tunc summone per bonos summonitores prædictum A quod sit coram justitiariis nostris apud Westmonasterium a die Paschæ in 15 dies, ostensurus quare non fecerit. Et habeas ibi summonitores et hoc breve. Teste, etc.[1]

Rex, etc. Præcipe A, etc., in quod idem A non habet ingressum nisi per C cui prædictus B illud dimisit ad terminum qui præteriit, ut dicit.[2] Et nisi, etc. Teste, etc.

Rex, etc. Præcipe A, etc., in quod idem A non habet ingressum nisi post dimissionem quam idem B inde fecit D ad terminum qui præteriit. Et quod post terminum illum ad præfatum B reverti debet, ut dicit.[3] Et nisi, etc. Teste, etc. [f. 228.

(2) writs of formedon

Rex, vicecomiti salutem. Præcipe A quod juste et sine dilatione reddat K manerium de N cum pertinentiis, quod C dedit D et hæredibus de corpore suo exeuntibus, et quod post mortem prædicti D præfato K filio et hæredi ejusdem D descendere debet per formam donationis prædictæ ut dicit.[4] Et nisi, etc. Teste, etc. [f. 238b.

Rex, etc. Præcipe A quod, etc., reddat B manerium, etc., quod C pater prædicti B cujus hæres ipse est, dedit I et F uxori ejus, et hæredibus de corporibus ipsorum I et F exeuntibus, et quod post

[1] In the "per." [2] In the "per and cui."
[3] In the "post." [4] In the descender.

mortem prædictorum I et F ad præfatum B reverti debet per formam donationis prædictæ, eo quod prædicti I et F obierunt sine hærede de corporibus suis exeunte ut dicit.[1] Et nisi, etc. Teste, etc. [f. 242.

Rex, etc. Præcipe A quod reddat B manerium, etc., quod C dedit D et hæredibus de corpore suo exeuntibus, ita quod si idem D sine hærede de corpore suo exeunte obiret, prædictum mesuagium præfato B hæredibus remaneret, et quod post mortem prædicti D præfato B remanere debet per formam donationis prædictæ, eo quod prædictus D obiit sine hærede de corpore suo exeunte ut dicit.[2] Et nisi, etc. Teste, etc. [f. 243.

(3) MESNE

Rex, vicecomiti salutem. Præcipe A quod juste, etc., acquietet B de servitio quod C ab eo exigit de libero tenemento suo quod de præfato A tenet in I unde idem A qui medius est inter eos, eum acquietare debet ut dicit, et unde queritur quod pro defectu ejus distringitur. Et nisi, etc. Teste, etc. [f. 160.

(4) CUSTOMS AND SERVICES

Rex, vicecomiti salutem. Præcipe A quod juste, etc., faciat B consuetudines et recta servitia quæ ei facere debet, de libero tenemento suo quod de eo tenet in N ut in redditibus, arreragiis, et aliis [vel sic, in homagiis, releviis, et aliis. Vel sic, in sectis, curiis, et aliis]. Et nisi fecerit, etc. Teste, etc. [f. 159.

(5) DE SCUTAGIO HABENDO

Rex, vicecomiti salutem. Quia dilectus et fidelis noster W habuit servitium suum nobiscum per preceptum nostrum in exercitu nostro Scotiæ anno regni nostri primo [vel fuit nobiscum per preceptum nostrum in exercitu, etc., anno, etc., sicut per rotulos A constabularii exercitus nostri prædicti nobis constat: vel sic, fecit finem nobiscum pro servitio suo in exercitu nostro Scotiæ anno, etc., sicut per certificationem thesaurarii et baronum nostrorum de scaccario in cancellariam nostram de mandato nostro missam nobis constat], tibi præcipimus quod eundem W habere facias scutagium suum de fœdis militum, quæ de ipso tunc tenebantur in balliva tua, videlicet 40 solidos de scuto pro exercitu prædicto, et hoc nullatenus omittas. Teste, etc. [f. 88.

(6) CESSAVIT

Rex, vicecomiti salutem. Præcipe A, etc., quod reddat B unum mesuagium, etc., quod idem A de eo tenet per certa servitia, et quod ad ipsum B reverti debet per formam statuti de communi consilio regni nostri Angliæ inde provisi, eo quod prædictus A in faciendo prædicta servitia per biennium jam cessavit ut dicit. Et nisi fecerit, etc. Teste, etc. [f. 237b.

(7) QUOD PERMITTAT

Rex, vicecomiti salutem. Præcipe A quod juste, etc., permittat B habere quoddam chiminum ultra terram ipsius A in N quod habere debet et solet ut dicit. Et nisi fecerit, etc. Teste, etc. [f. 155.

[1] In the reverter. [2] In the remainder.

(8) CUI IN VITA

Rex, vicecomiti salutem. Præcipe A quod juste, etc., reddat B quæ fuit uxor K unum mesuagium terræ cum pertinentiis in N quod clamat esse jus et hæreditatem suam, et in quod idem A non habet ingressum, nisi per prædictum K quondam virum ipsius B qui illud ei dimisit, cui ipsa in vita sua contradicere non potuit ut dicit. Et nisi fecerit, etc. Teste, etc. [f. 232b.

(9) AYEL, BESAIEL, AND COSINAGE

Rex, vicecomiti salutem. Præcipe A quod juste, etc., reddat H unum mesuagium cum pertinentiis in E de quo W avus prædicti H [vel avia, vel proavus, vel consanguineus prædicti H] cujus hæres ipse est, fuit seisitus [vel seisita] in dominico suo ut de fœdo die quo obiit ut dicit. Et nisi, etc. Teste, etc. [f. 226.

(10) DOWER, UNDE NIHIL HABET

Rex, vicecomiti salutem. Præcipe A quod juste, etc., reddat B quæ fuit uxor C rationabilem dotem suam, quæ eam contingit de libero tenemento quod fuit prædicti C quondam viri sui in N unde nihil habet ut dicit. Et nisi fecerit, etc. Teste, etc. [f. 170.

(11) QUARE IMPEDIT

Rex, vicecomiti salutem. Præcipe W Archiepiscopo Cantuar. et R quod juste, etc., permittant nos præsentare idoneam personam ad Ecclesiam de W quæ vacat et ad nostram spectat donationem, ratione Archiepiscopatus Cantuar. nuper vacantis et in manu nostra existentis. Et unde Archiepiscopus et R nos injuste impediunt ut dicitur. Et nisi fecerint, summoneas per bonos summonitores prædictos Archiepiscopum et R, quod sint coram nobis, etc., ostensuri, etc. Teste, etc. [f. 30b.

(12) LITTLE WRIT OF RIGHT

Rex, ballivis suis de A salutem. Præcipimus vobis quod sine dilatione et secundum consuetudinem manerii nostri de A plenum rectum teneatis L de uno mesuagio cum pertinentiis in I quod G ei deforciat: ne amplius inde clamorem audiamus pro defectu recti. Teste, etc. [f. 9.

(13) MONSTRAVERUNT

Rex, abbati de N salutem. Monstraverunt nobis homines tui [vel A, B et C homines tui] de manerio de I quod est de antiquo dominico coronæ Angliæ ut dicitur, quod tu exigis ab eis alias consuetudines et alia servitia quam facere debent, et antecessores sui tenentes de eodem manerio facere consueverunt, temporibus quibus manerium illud fuerit in manibus progenitorum nostrorum quondam Regum Angliæ, vel in manu nostra. Et ideo tibi præcipimus quod a præfatis hominibus non exigas aut exigi permittas alias consuetudines vel alia servitia quam facere debent, et antecessores sui prædicti facere consueverunt temporibus prædictis. Et nisi ad mandatum nostrum hoc feceris: A vicecomiti nostro Lincolniæ id fieri præcipiemus. Teste, etc. [f. 14

(14) QUARE EJECIT INFRA TERMINUM

Rex, vicecomiti salutem. Si A te fecerit securum de clamore suo prosequendo, tunc summoneas per bonos summonitores B quod sit coram justitiariis nostris apud Westmonasterium ostensurus quare deforciat præfato A unum mesuagium cum pertinentiis in N quod C ei dimisit ad terminum qui nondum præteriit, infra quem terminum idem C præfato B mesuagium illud vendidit, occasione cujus venditionis idem B præfatum A de mesuagio prædicto ejecit ut dicit. Et habeas ibi summonitores et hoc breve. Teste, etc. [f. 227.

(15) EJECTIO FIRMÆ

Rex, vicecomiti salutem. Si A te fecerit, etc., tunc pone per vadium et salvos plegios B quod sit coram justitiariis, etc., ostensurus quare vi et armis manerium de I quod C præfato A dimisit ad terminum qui nondum præteriit, intravit, et bona et catalla ejusdem A ad valentiam tanti in eodem manerio inventa cepit et asportavit, et ipsum a firma sua prædicta ejecit, et alia enormia ei intulit ad grave damnum ipsius A et contra pacem nostram. Et habeas ibi nomina plegiorum et hoc breve. Teste, etc. [f. 227b.

(16) DE NATIVO HABENDO

Rex, vicecomiti salutem. Præcipimus tibi quod juste et sine dilatione facias habere A de C B nativum et fugitivum suum, cum omnibus catallis suis et tota sequela sua, ubicunque inventus fuerit in balliva tua, nisi sit in dominico nostro, qui fugit de terra sua post coronationem domini Henrici regis filii Johannis. Et prohibemus super forisfacturam nostram, ne quis eum injuste detineat. Teste, etc. [f. 87.

(17) DE LIBERTATE PROBANDA

Rex, vicecomiti salutem. Monstraverunt nobis A et B soror ejus, quod cum ipsi liberi homines sint et parati libertatem suam probare : E clamans eos nativos suos, vexat eos injuste. Et ideo tibi præcipimus, quod si prædicti A et B fecerint te securum de libertate sua probanda : tunc ponas loquelam illam coram justitiariis nostris ad primam assisam cum in partes illas venerint : quia hujusmodi probatio non pertinet ad te capienda. Et interim eisdem A et B pacem inde habere facias. Et dic præfato E quod tunc sit ibi loquelam suam versus præfatos A et B inde prosecuturus si voluerit. Et habeas ibi hoc breve. Teste, etc. [f. 87b.

B. PERSONAL ACTIONS

(1) DEBT

Rex, vicecomiti L salutem. Præcipe A quod juste et sine dilatione reddat B centum solidos, quos ei debet et injuste detinet ut dicit. Et nisi fecerit, et prædictus B fecerit te securum de clamore suo prosequendo : tunc summone per bonos summonitores prædictum A quod sit coram justitiariis nostris apud Westmonasterium a die Paschæ in 15 dies, ostensurus quare non fecerit. Et habeas ibi summonitores et hoc breve. Teste, etc. [f. 139b.

(2) DETINUE

Rex, vicecomiti L salutem. Præcipe I quod juste, etc., reddat W catalla ad valenciam centum solidorum, et quandam pixidem cum cartis scriptis et aliis munimentis in eadem pixide contentis, quæ ei injuste detinet ut dicit. Et nisi, etc. [f. 139b.

(3) COVENANT

Rex, vicecomiti L salutem. Præcipe N abbati de B H de I et E de T quod juste, etc., teneant W de N conventionem inter eos factam, de viginti acris terræ suæ in K frumento et alio blado competenti seminandis, et de bladis in terris prædictis crescentibus metendis, et ad domum ipsius W sumptibus eorundem abbatis H et E in eadem villa cariandis. Et nisi fecerint, etc. [f. 166.

(4) ACCOUNT

Rex, vicecomiti Kanciæ salutem. Præcipimus tibi quod justities Johannem Brown, quod juste et sine dilatione reddat B rationabilem computum suum, de tempore quo fuit ballivus suus in N et receptor denariorum ipsius B sicut rationabiliter monstrare poterit quod ei reddere debeat: ne amplius inde clamorem audiamus pro defectu justitiæ. Teste, etc. [f. 135.

(5) TRESPASS TO THE PERSON

Rex, vicecomiti Lincolniæ salutem. Si A fecerit te securum de clamore suo prosequendo: tunc pone per vadium et salvos plegios B quod sit coram justitiariis nostris apud Westmonasterium in octavis sancti Michaelis [*or in the alternative* quod sit coram nobis in octavis sancti Michaelis ubicumque tunc fuerimus in Anglia] ostensurus quare vi et armis in ipsum A apud N insultum fecit, et ipsum verberavit, vulneravit et male tractavit: ita quod de vita ejus desperabatur, et alia enormia ei intulit, ad grave damnum ipsius A, et contra pacem nostram. Et habeas ibi nomina plegiorum et hoc breve. Teste, etc. [f. 93.

(6) TRESPASS TO LAND AND GOODS

Rex, etc. Si A, etc. Tunc pone, etc., B quod sit, etc., ostensurus quare vi, etc., clausum ipsius A apud T fregit et arbores suas ibidem nuper crescentes succidit, et in separali piscaria sua ibidem piscatus fuit, et herbam suam ibidem nuper crescentem falcavit, et fænum inde proveniens, ac piscem de piscaria prædicta, necnon arbores prædictas, et alia bona et catalla sua ad valentiam viginti marcarum, ac quadraginta libras de denariis suis in pecunia numerata ibidem inventa cepit et asportavit, et alia enormia ei intulit, ad grave damnum, etc. Et habeas, etc. Teste, etc. [f. 110.

(7) TRESPASS ON THE CASE

Rex, etc. Si A fecerit, etc. Tunc pone, etc., B ostensurus quare cum secundum legem et consuetudinem regni nostri Angliæ, hospitatores qui hospitia communia tenent ad hospitandum homines per partes ubi hujusmodi hospitia existunt transeuntes et in eisdem hospitantes, eorum bona et catalla infra hospitia existentia, absque subtractione seu amissione custodire die et nocte teneantur, ita quod pro defectu hospitatorum

seu servientium suorum, hujusmodi hospitibus damna non eveniunt ullo modo : quidam malefactores quadraginta solidos de denariis ipsius A in pecunia numerata in hospitio ipsius B apud N. hospitati inventos, in defectu ipsius B et servientium suorum prædictorum ceperunt et asportaverunt, et alia enormia ei intulit, ad grave damnum ipsius A et contra legem et consuetudinem supra dictas. Et habeas, etc. Teste, etc.

[ff. 104, 104b.

(8) ASSUMPSIT (MISFEASANCE)

Rex, etc. Si A fecerit, etc. Pone, etc., ostensurus quare cum idem B pro competenti salario suo ad sanandum prædictum A de morbo petre, quo tempore graviter detinebatur, apud F assumpsisset : idem B talia opera colore medicinæ eidem A imposuit, et tam graves cissuras super ipsum fecit, quod de vita ejus desperabatur : et sumpto ab eodem A hujusmodi salario, ipsum de morbo prædicto non curatum reliquit vel non curavit ad damnum, etc., 20 libras ut dicit. Et habeas, etc. Teste, etc. [f. 105b.

(9) ASSUMPSIT (NON-FEASANCE)

Rex, etc. Si H S fecerit, etc. Pone, etc. R F de B quod sit, etc., ostensurus quare cum idem R quasdam arbores ipsius H apud B nuper crescentes succidere, et abinde usque mansum ipsius H apud L infra certum tempus cariare apud L assumpsisset, idem R arbores prædictas succidere et usque mansum prædictum infra dictum tempus cariare non curavit, ad dampnum ipsius H centum solidorum ut dicit. Et habeas, etc. Teste, etc. [f. 109b.

II

A MANORIAL EXTENT

Ryptona Regis

Inquisitio facta de Ryptona Regis, per Hugonem Præpositum, Umfridum de Colevillc, Symonem filium Aylwini.

Ecclesia est in donatione Regis, et percipit majores decimas de dominico.

Pertinet etiam ad eandem una virgata terræ, et una acra prati, in puram et perpetuam elemosinam.

In eadem sunt quinque hydæ terræ, de quibus duæ hydæ sunt in dominico, et tres hydæ sokemannorum, quæ continent viginti virgatas et dimidiam.

Viginti quatuor acræ faciunt virgatam.

De prædictis tribus hydis tenet Henricus le Freman duas virgatas, et reddit inde per annum undecim solidos ad quatuor terminos, scilicet in festo Sancti Andreæ, Annunciationis, Sancti Johannis, et Sancti Michaelis, ad singulos æqualiter.

Solebat esse in communa villatæ, ut in talliagio et similibus.

Nulla inde facit.

Nicholaus le Stalkere tenet unam virgatam terræ, et reddit inde per annum duos solidos, unum denarium, ad terminos præscriptos, ad singulos æqualiter.

A festo Sancti Michaelis usque ad Gulam Augusti operabitur qualibet septimana per unum diem, scilicet die Lunæ vel die Mercurii, quodcumque opus ei præceptum fuerit.

Et præterea, arabit uno die cum quot capitibus habet in caruca, ita quod quælibet caruca arabit unam sellionem, sicut jacet, et hoc nisi festum impediat.

Et tunc per totum annum computabitur unum festum domino, et aliud sibi, præterquam quindecim diebus Natalis, et quindecim diebus Paschæ, et Pentecostes, in quibus nec arabit, nec aliud genus operis faciet.

Quodcunque genus operis facere debeat, præterquam in bosco, operabitur per totum annum ab ortu solis usque ad occasum.

Si debeat colligere virgam mundatam vel palos, colliget et portabit usque in curiam unum fesciculum pro opere unius diei.

Si spinas, colliget et portabit usque in curiam duos fesciculos pro opere unius diei.

Die vero quo falcabunt Haycroft, tota villata habebit de bursa Abbatis octo denarios ad Sythale.

Et si ea die orta fuerit inter ipsos aliqua contentio, dominus Abbas inde non occasionabit eos, nec implacitabit, sed quicquid ibi transgressum fuerit inter ipsos, emendabitur.

Die etiam quo falcabit, habebit unum fesciculum herbæ, ligatum ligamine de herba, quantum poterit levare super hastam falcis suæ, ita quod si hasta confringatur præ ponderositate herbæ, non occasionabitur inde, sed amittet herbam ; et hoc habebit tantum uno die.

Tota villata, una cum carro vel carrectis domini Abbatis, carriabit ad diem suum, et tassabit totum fenum.

Ad hybernagium seminabunt duo terram tenentes unam rodam de frumento proprio, et habebunt singuli eorum in autumno sequenti unam garbam de eodem frumento, quantum poterit ligare uno ligamine, pro suo semine.

A Gula Augusti usque blada reponantur in horrea, operabitur qualibet septimana per tres dies, scilicet die Lunæ, Mercurii, et Veneris.

Ita scilicet, quod si dies Gulæ Augusti die Lunæ venerit, illa septimana non operabitur nisi duobus diebus, scilicet die Mercurii et Veneris.

Nullam, quamdiu messis duraverit, faciet aruram.

Ad precariam veniet quilibet, qui falcem portare potest, tam terram tenentium, quam aliorum, præter uxores eorum, et habebunt singuli eorum unum panem, carnem, et cervisiam, et ad diem proprium mittet, quilibet unum hominem ad metendum, ad reddendum cibum precariæ.

A tempore vero quo blada plene fuerint collecta, et ostia grangiarum serrata, usque ad festum Sancti Michaelis, operabitur omni eodem modo, sicut post festum Sancti Michaelis.

Præpositus, qui per annum duraverit in præpositura, habebit fundum unius mullionis feni, spissitudinis quod possit ipsum perforare uno ictu furcæ ferreæ.

Sciendum etiam, quod quodcunque opus fecerit, vel ubicunque operatus fuerit infra villam, veniet ad dinarium suum, et post dinarium redibit ad opus suum.

Fulco Stalkere tenet unam virgatam eodem modo, quo Nicholaus.

Willelmus Oky et Robertus filius Swain tenent duas dimidias virgatas eodem modo, quo Nicholaus.

Willelmus filius Adæ tenet unam virgatam eodem modo, quo Nicholaus.

Bartholomæus filius Simonis tenet duas virgatas, et facit pro utraque illarum, sicut Nicholaus pro sua.

Johannes filius Aylwini tenet unam virgatam eodem modo, quo Nicholaus.

Johannes filius Andreæ tenet unam virgatam eodem modo, quo Nicholaus.

Thomas Derlyng et Henricus Serviens tenent duas dimidias virgatas et faciunt sicut Nicholaus.

Aluredus et Johannes de Esthorpe tenent duas dimidias virgatas eodem modo, quo Nicholaus.

Willelmus de Somerforde, et Bartholomæus filius Alexandri tenent duas dimidias virgatas eodem modo, quo Nicholaus.

Thomas Palmere et Cristina vidua tenent duas dimidias virgatas eodem modo, quo Nicholaus.

Hugo filius Simonis et Thomas Archier tenent duas dimidias virgatas eodem modo, quo Nicholaus.

Arnulphus filius Rogeri et Umfridus tenent duas dimidias virgatas eodem modo, quo Nicholaus.

Adam Neuman et Robertus Akerman tenent duas dimidias virgatas, sicut Nicholaus.

Ricardus filius Hugonis et Hugun filius Ricardi tenent duas dimidias virgatas, sicut Nicholaus.

Matilda Palmere tenet unam virgatam eodem modo, quo Nicholaus.

Gunilda vidua et Simon filius Aylwini tenent duas virgatas eodem modo, quo Nicholaus.

Hugo Præpositus, et Radulfus frater ejus, tenent duas dimidias virgatas eodem modo, quo Nicholaus.

Brythwoldus filius Rogeri tenet dimidiam virgatam, et facit pro ea quantum pertinet ad dimidiam virgatam, sicut Nicholaus.

Ricardus le Soere tenet unam croftam, et unam acram terræ, et reddit inde per annum quatuor denarios ad quatuor præscriptos terminos.

Et præterea, operatur qualibet septimana per unum diem, sicut virgatarius.

Hugo Greyling tenet unam croftam terræ, et facit in omnibus sicut [Ricardus] le Soere.

Hugo filius Ricardi tenet unam croftam, et unam rodam terræ, et facit pro eis in omnibus sicut Hugo Greylyng.

Inquirendum est de Hynlande.

[Ramsey Cart. (R.S.) i pp. 397–400, no. ccxx.

III

EARLY CONVEYANCES

(1) THE LAND BOOK

† In nomine sancti saluatoris dei et domini nostri Ihesu Christi, regnante et gubernante eodem domino Ihesu simulque spiritu sancto gubernacula in imis et in arduis disponendo ubique regit! Licet sermo sapientium consiliumque prudentium stabilis permaneat, tamen ob incertitudine temporalium rerum, diuinis numinibus muniendo, perscrutando, pro ignotis et incertis euentis, stabilienda roborandaque in deo uiuo et uero sunt. Qua-propter ego Cœnulfus gratia dei rex Merciorum, uiro uerando in Christi charitate summo pontificalis apice decorato, Uulfredo archiepiscopo dabo et concedo aliquam partem terræ juris mei, quæ mihi largitor omnium bonorum deus donare dignatus est, pro intimo caritatis affectu, ut apostolus ait, hilarem enim datorem diligit deus. Et hoc est in loco qui dicitur Binnanea,

circiter xxx iugera, inter duos rivos gremiales fluminis quod dicitur Stur. Et hæc terra libera permaneat in perpetuam possessionem æclesiæ Christi. Quod si quisquis huic largitioni contradixerit, contradicat eum deus, et denegat ingressum cœlestis uitæ. Actum est hoc anno dominicæ incarnationis DCCC.XIIII°. Indict. VI. his testibus consentientibus atque confirmantibus, quorum nomina nota sunt.

† Ego Cœnuulf gratia dei rex Merciorum hanc donationis confirmationem signo crucis Christi roboraui.

† Ego Uulfred archiepiscopus consensi et subscripsi.

† Ego Denebyrht episcopus consensi et subscripsi.

† Ego Uulfhard episcopus consensi et subscripsi.

† Signum manus Eadberhti ducis.

† Signum manus Ealhheardi ducis.

† Signum manus Ceoluulfi ducis.

[Earle, Land Charters 98, 99.

(2) THE LÆN

Anno dominicæ incarnationis DCCCC.LXII. Ego Oswoldus superni rectoris fultus juvamine præsul cum licentia Eadgari regis Anglorum ac Ælfheri ducis Merciorum uni levitarum meorum qui a gnosticis noto Ealfherd nuncupatur vocabulo ob ejus fidele obseqium quandam ruris particulam unam videlicet mansam quod solito vocatur nomine Cumtún cum omnibus ad se rite pertinentibus liberaliter concessi ut ipse vita comite fideliter perfruatur et post vitæ suæ terminum duobus quibus voluerit cleronomis de relinquat, quibus etiam defunctis rus predictum cum omnibus utensilibus ad usum primatis æcclesiæ Dei in Weogorna ceastre restituatur immunis.

† Ego Oswaldus Dei providentia archipræsul hanc meam donationem confirmavi.

(Followed by seventeen other names—two priests, one deacon, and the rest clerks.)

[Birch, Cartularium Saxonicum no. 1089.

(3) WRIT FORM OF CONVEYANCE

(1114-30)

Reinaldus abbas Ramesiensis Hugoni de Bochland, Rogero Leofstano, Ordgaro, et omnibus aliis baronibus Lundoniæ, salutem,

Sciatis me concessisse cum fratrum consensu in capitulo, huic Willelmo filio Teotri illam terram in feoudum sibi et heredi ejus, quam Osgodus Albus tenuit de Sancto Benedicto ad eundem censum, quo ille eam tenuit, dum viveret, scilicet pro quinquaginta solidis.

Ad hanc conventionem hi testes sunt, videlicet Andreas de Londonia, Wido, Radulphus de Feltre, Edveruuinus nepos abbatis, Herveus Aurifex, Henricus de Sancto Albano.

[Ramsey Cart. (R.S.) i p. 130, no. xliii.

(4) TRANSITION BETWEEN THE ANGLO-SAXON AND ANGLO-NORMAN FORMS OF CONVEYANCE

(1134)

In nomine Sanctæ et Individuæ Trinitatis, Patris et Filii et Spiritus Sancti

Ego Albreda filia Remelini, quæ fui uxor Eustachii de Sellea, omnibus præsentibus et futuris notum facio, quod paucis annis post obitum viri mei evolutis, divina miseratione respecta et inspiratione compuncta, pro salute animæ meæ, et viri mei, et antecessorum meorum, dedi et concessi, et hac præsenti carta mea confirmavi, Deo, et ecclesiæ Sancti Benedicti de Ramesia, et abbati et monachis ibidem Deo servientibus, in puram et perpetuam elemosinam, manerium de Waltona, quod jure hereditario meum fuit, tenendum ipsi ecclesiæ inperpetuum, cum omnibus appendiciis et pertinentiis suis, infra villam et extra, scilicet in terris, in pratis, in pascuis, in bosco, et in plano, in aquis et mariscis, cum insula quæ Anglice Higkeneia appellatur, et cum omnibus aliis rebus, cum libertatibus quoque et consuetudinibus eidem terræ pertinentibus, sicut ego vel aliquis prædecessorum meorum umquam liberius et quietius tenuimus. Volo itaque et firmiter concedo, quod prædicti ecclesia et monachi habeant et teneant prædictum manerium inperpetuum, cum omnibus pertinentiis suis, et quietum et absolutum a me et ab omnibus heredibus meis, et ab omni humana servitudine et exactione, quantum ad me et heredes meos pertinet. Hanc autem donationem meam feci prædictis ecclesiæ et monachis, præsentibus, et assentiente domino Waltero de Bolebech, de cujus feudo fuit ipsum manerium, et Hugone filio et herede ipsius Walteri, et Eustachio filio et herede meo, in præsentia Christianissimi regis Henrici, anno ab Incarnatione Domini nostri Ihesu Christi millesimo centesimo tricesimo quarto, regni vero ipsius Henrici regis tricesimo quinto.

Et ut hæc mea donatio firma sit et stabilis, eam sigilli mei impressione curavi roborare. Sub his testibus, domino meo Waltero de Bolebech domini feudi illius, et Hugone filio et herede ipsius; domino Henrico, Archidyacono Huntedoniæ; Eustachio filio et herede meo, Brien filio Galfridi de Scalariis, Berengario Monacho, Henrico de Wichentone, Widone Juvene, Rogero Mowyn, Godrich de Ailingtona, Alin de Gillinges, Roberto de Cuningtone, Willelmo de Lindeseya, Johanne filio Widonis de Burwelle; Willelmo Britone, cum hominibus suis, Roberto et Alemmo; Rogero et Osketel Clericis; Willelmo Coco, Godman de Laushille, et multis aliis.

Quisquis igitur hanc meam donationem infringere vel delere præsumpserit, deleat eum Deus de libro vitæ, et cum Dathan et Abyron in profundum gehennæ ignium demergetur, Amen. Qui vero eam firmare, solidare, et ampliare studuerint, vitam et requiem sempiternam cum Sanctis omnibus obtineant inperpetuum; Amen, Amen, Amen.

[Ramsey Cart. (R.S.) i pp. 155, 156, no. xcii.

(5) INDENTURE FORM OF CONVEYANCE (1215-23)

Hec est conventio facta inter dominum A abbatem et conventum Egneshamie et Robertum le Grant de Finestok, scilicit quod predicti abbas et conventus tradiderunt et concesserunt predicto Roberto terram suam de Finestok cum quodam assarto, quam deliberaverunt de manibus Roberti Arsic et Petri Staninges, quam ipsi habuerunt et tenuerunt occasione quarumdam conventionum inter eos factarum, habendam et tenendam illi et heredibus imperpetuum de predictis abbate et conventu libere, quiete, pacifice, integre, reddendo inde annuatim dictis abbati et conventui quatuor solidos sterlingorum ad quatuor anni terminos, videlicet ad festum sancti Thome apostoli xii

denarios, ad Annunciacionem beate Marie xii denarios, ad Nativitatem sancti Johannis Baptiste xii denarios, et ad festum sancti Michaelis xii denarios pro omnibus servitiis et omnibus exactionibus dictis abbati et conventui pertinentibus, salvo servitio domini regis, scilicet quantum pertinet ad vicesimam partem unius militis, ita tamen quod nec Robertus nec ejus heredes aliquid de predicta terra dabunt alicui in feodum, vel ad firmam perpetuam tradent, vel invadiabunt, aut vendent aut aliquo modo alienabunt, nisi dictis abbati et conventui, vel per ipsorum licentiam et voluntatem. Et predictus Robertus et heredes sui conservabunt supra predictos abbatem et conventum et omnes suos per omnia acquietabunt versus dominum regem et dominum Falcasium de plegiagio, quod factum fuit versus dominum Falcasium pro deliberatione ejusdem terre, quando saisiata fuit in manu domini regis et in manu domini Falcasii; ita quod nec abbas nec conventus, nec Petrus clericus abbatis vel ejus plegii aliquod damnum incurrent versus aliquem pro illa terra. Preterea memoratus Robertus concessit et confirmavit pro se et heredibus suis memoratis abbati et conventui excambium quod fecit cum magistro P. de prato suo ex utraque parte de Teppewelle cum orto adjacente pro domo Lewrich et quadam parva purprestura, quas predictus P. sibi concessit, sicut continetur in carta quam idem P. habuit de eo, liberum et quietum imperpetuum secundum formam et tenorem memorate carte sue. Item idem Robertus obligavit se et heredes suos per hoc cyrographum suum, quod de cetero fideles existent dictis abbati et conventui in omnibus et precipue de predicto servitio fideliter faciendo: ita quod nisi de dicto servitio et aliis rebus eis debitis fidelitatem eis servaverint, libere capient dictum tenementum in manus suas, sine spe quod dictus Robertus nec ejus heredes umquam aliquid inde recuperent. Et pro hac traditione et concessione dedit dictus Robertus dictis abbati et conventui quadraginta solidos sterlingorum. Hec autem fideliter observanda pro se et heredibus suis memoratus Robertus tactis sacrosanctis juravit. Et in hujus rei testimonium, tam abbas et conventus quam supradictus Robertus huic scripto signa apposuerunt. Hiis testibus, Johanne porterio, domino Willelmo Blundo, Avenello, Waltero de Submuro, Ricardo de Submuro, Roberto Marescallo, Hernaldo Frankelano, et multis aliis.

[Eynsham Cart. (Oxford Hist. Soc.) i pp. 146, 147, no. 197.

(6) DEED POLL FORM OF CONVEYANCE (1241-64)

Omnibus Christi fidelibus, ad quos presens scriptum pervenerit, Nicholaus Scissor de Sewelle et Ysabella uxor ejus salutem eternam in domino. Noverit universitas vestra nos remisisse et quietum clamasse domino abbati et conventui de Eggneshame totum jus et clamium, quod habuimus vel habere potuimus de tenemento Juliane filie Johannis Watemon de Sevewelle et de tenemento Alicie filie Willelmi de Stortone; ita quod nec nos nec heredes nostri aliquod jus vel clamium de prefatis tenementis aliquo modo vendicabimus vel vendicare poterimus. Pro hac autem remissione et quieta clamacione dedit nobis dictus abbas viginti solidos in gersummam. Et ut hæc remissio et quieta clamacio rata et stabilis in perpetuum permaneat, huic presenti scripto, quia sigillum proprium non habui, sigillum domini Hugonis de Tywe apposui. Hiis testibus.

[Eynsham Cart. (Oxford Hist. Soc.) i p. 217, no. 310.

(7) FINES

Twelfth Century

Hæc est finalis concordia facta in curia domini Regis apud Westmonasterium die Jovis proxima post festum Sancti Marci Ewangele anno regni Regis Henrici secundi xx° viii° coram R. Wintoniæ et J. Norwiciæ episcopis et Rannulpho de Glanvill justiciario domini Regis et Ricardo Thesaurario domini Regis et Rogero filio Reinfridi et Willelmo Ruffo et Thoma filio Bernardi et Willelmo Basseth et Michelo Beleth et Willelmo Torel et Osberto de Glanvill et Willelmo de Abbervill et Rannulpho de Gedding et Gervasio de Cornhill et ceteris baronibus et fidelibus domini Regis qui tunc ibi aderant: Inter Robertum abbatem de Rameseye et Thomam de Tanton de tota terra quam prædictus Thomas habuit in feria Sancti Yvonis scilicet quod predictus Thomas totam terram illam cum domibus et omnibus pertinenciis suis quietam clamavit eidem abbati et monasterio de Rameseye de se et heredibus suis inperpetuum pro xx marcis quas idem abbas ei dedit et Thomas cartam suam quam inde habuit reddidit eidem abbati.

[Hunter, Fines (R.C.) xxi, xxii.

Fourteenth Century

Hæc est Finalis Concordia facta in Curia Domini Regis apud Westmonasterium a die Sancti Michaelis in tres septimanas, Anno regni Edwardi Regis tercii a conquestu quadragesimo octavo, et regni ejusdem Regis Franciæ, tricesimo quinto, coram Roberto Bealknapp, Willelmo de Withyngham, et Rogero de Kirketon Justiciariis, et aliis Domini Regis fidelibus tunc ibi præsentibus, Inter Henricum le English et Margaretam uxorem ejus querentes, Et Johannem Roughey et Agnetem uxorem ejus deforciantes, de uno Mesuagio, centum acris terræ, sex acris prati, sex acris pasturæ, decem acris bosci, et tribus solidatis et quatuor denaratis redditus, cum pertinenciis in Kertelyngg, Ditton Valence, Ditton Camoys, Steuchesworth, Unde placitum Convencionis summonitum fuit inter eos in eadem Curia, scilicet quod prædicti Johannes et Agnes recognoverunt, prædicta tenementa cum pertinenciis esse Jus ipsius Henrici; et illa eisdem Henrico et Margaretæ reddiderunt in eadem Curia; Habenda et tenenda eisdem Henrico et Margaretæ et hæredibus ipsius Henrici, de Capitalibus dominis fœdi illius, per servicia quæ ad prædicta tenementa pertinent imperpetuum. Et præterea, iidem Johannes et Agnes pro se et hæredibus ipsius Agnetis, quod ipsi Warrantizabunt prædictis Henrico et Margaretæ et hæredibus ipsius Henrici prædicta tenementa cum pertinenciis contra omnes homines imperpetuum. Et pro hac recognicione, reddicione, Warrantia, fine, et concordia, iidem Henricus et Margareta dederunt prædictis Johanni et Agneti Centum marcas argenti.

[Madox, Form. Angl. no. ccclxxxii.

IV

WILLS

(1) TENTH CENTURY

In nomine domini. Ego Wlfgiva omnibus notum facio hoc quod omnipotenti Deo concedere volo post dies meos pro anima mea;

villam scilicet de Bramcestria do Deo et sancto Benedicto Ramesiæ; hoc volo ut firmiter stet et a nullo hominum immutetur. Hoc scriptum fuit in tribus partibus divisum, quarum una remansit in manibus Æthelstani episcopi, alteram mecum retinui, tertiam obtuli Ramesiam. Deus omnipotens custodiat omnes quicunque hoc custodire voluerint, et qui hoc immutare attentaverit Deus illum ad justitiam et emendationem revocet. Amen. [Birch, Cartularium Saxonicum no. 1059.

(2) FOURTEENTH CENTURY

In Dei nomine, Amen. Noverint universi me Henricum de Ingelby prebendarium prebendarum de Southcave et de Castre in ecclesiis Cathedralibus Ebor. et Lincoln, de Oxton et Crophill in ecclesia collegiata Suthwell Ebor. dioceseos, ac eciam prebendarius in ecclesia Collegiata de Derlington, necnon rector ecclesiæ parochialis de Halghton Dunelm. dioceseos, scientem nichil morte cercius nilque incercius ejus hora, in sana et plena deliberata memoria mea condere testamentum meum in hunc modum. In primis lego animam meam Illi qui me preciosissimo sanguine suo redemit. Item lego corpus meum miserum ad sepeliendum absque pompa sæculari in ecclesia Cathedrali Ebor. in eventu quo apud Ebor. vel prope Ebor. decedere me contingat. Et si forte alibi, in loco aliorum beneficiorum meorum vel prope decessero, tunc sepelliatur corpus prædictum in ecclesia beneficiali illius loci, videlicet ante magnum altare, si commode fieri poterit; si vero in loco distanti per triginta millaria ab aliquo beneficiorum meorum de medio fuero subtractus, tunc sepeliatur corpus meum in ecclesia parochiali vel infra cimeterium ejusdem loci. Item lego novæ fabricæ ecclesiæ Ebor. xl*l* in eventu quo Ebor. me sepelliri contingat; sin autem, l marcas. Item lego religiosis subscriptis ad orandum specialiter pro animabus Thomæ de Ingilby patris mei et Edelinæ matris meæ, dominorum Johannis de Ingilby, David de Wollour, et Willielmi de Dalton ac Willielmi de Benham, necnon pro salubri statu Domini Regis dum vixerit, et pro anima sua cum ab hac luce migraverit, et pro animabus omnium benefactorum tam meorum quam dictorum amicorum meorum, et omnium aliorum fidelium defunctorum, summas subscriptas, videlicet, Abbati et Conventui Rievall xx*l*. Priori et Conventui de Gisburne xx marcas. Abbati et Conventui de Jorevall xx marcas, Priorissæ et Conventui de Nuncotom xl*l*. Priorissæ et Conventui de Neceham v marcas, Fratri Hugoni de Karliolo *cs*. Thomæ de Ellerbek monacho x*l*. Item cuilibet ordini Fratrum Mendicancium Ebor. xl*s*. Item lego capitulo Ebor. cistam meam ferream, quæ fuit Magistri Thomæ de Nevell, et jam stat revestiario ecclesiæ Ebor. Volo tamen quod, expedita primitus sepultura mea, absque pompa seculari, ut præmittitur, honeste tamen detractionem debitaque mea quibuscumque debere contigerit tempore mortis meæ ante omnia persolvantur. Residuum vero omnium bonorum meorum ubicumque inventorum dedi et concessi dilectis michi in Christo Magistris Johanni de Waltham canonico Ebor. et Johanni de Norton, Curiæ Ebor. advocato, habendum et disponendum plene et libere absque computacione coram quocunque Ordinario inde facienda. Eosdem autem magistros Johannem et Johannem, dominum Johannem de Waddesworth rectorem ecclesiæ de Brytteby, Johannem de Hayton, Thomam atte Garth, et Andream de Stook facio et constituto meos veros et legitimos executores, per presentes, quibus sigillum meum apposui in testimonium premissorum. Hiis testibus, domino Roberto

Rectore ecclesiæ de Wynston Dunelm. dioceseos, domino Ricardo de Clowdesdal vicario chori Ebor., domino Ricardo Oliver capellano, Hugone de Blakestone, Willielmo de Cleveland, Willielmo Baldyng coco, et aliis. Datum Ebor. xv die Junii anno Domini MCCCLXXV. [Prob. xx Oct. MCCCLXXV.]

[Testamenta Eboracensia (Surt. Soc.) i pp. 94, 95.

(3) FIFTEENTH CENTURY

In Dei nomine, Amen. Vicesimo octavo die Mensis Novembris, Anno Domini Millesimo CCCCLXXIII. Y Custans Potkyn, hoole and fresch, make my Wille in this maner. First I bequeath my sowle to Almyghty God, to owre blessed Lady, and to all the Holy Company of hevyn ; my body to be beryed in Chalke Chirche. Also y be quethe to the hy auter viii*d*. Also to the Rode lyght a Cowe with v Ewes. Also to owre Lady of Pete' iii Ewes. Also to the lyght of Seynt John Baptyste iiii Ewes. Also to a Torche vis. viii*d*. Also to Alson Potkyn iiii quarter barly ; Also a Cowe with iiii shepe, iiii peyre shets parte of the best, with a bord cloth of diapur, Another of playne, iii Towels of diapur with ii keverletts, iii blanketts, a mattras, a bolster, iiii pelewes, vi Candelstikes. To Marget Crippis ii Candelstikes, a peyre shetis, a quarter barly. To Thomas Harry iii quarter barly, a peyre shetis, with a blanket. To Thomas Crippe a peyre shetis. To John Martyn a peyre shetis. To every gode child a boz barly. The residue of my godes I will that Richard and John my Sones, myn Executours, have and dispose for the helthe of my Sowle as they see that best ys.

Indorsed thus. Probatum fuit præsens testamentum coram nobis Officiali Roffensi apud Derteforde xxviii die mensis Marcii, Anno Domini MCCCCLXXIIII ; Et commissa est administracio omnium bonorum infrascriptæ defunctæ Ricardo Martyn et Johanni Martyn Executoribus infranominatis, in forma juris juratis et admissis.

[Madox, Form. Angl. no. dcclxxviii.

V

STATUTES MERCHANT AND STAPLE

STATUTE MERCHANT

Noverint universi etc. nos A.B. et C.D. teneri et per præsens scriptum de Statuto Mercatorum firmiter obligari W.P. in quinquaginta libris sterlingorum. Solvendis eidem W.P. aut suo certo Atturnato hoc scriptum ostendendo, executoribus vel administratis suis, in festo P. proximo futuro post datum presentium. Et nisi fecerimus volumus et per præsentes concedimus quod curret super nos et utrumque nostrorum, hæredum, executorum, et administratorum nostrorum, pœna et districtio provisæ in statuto domini Regis apud Acton Burnel et Westmonasterium pro Merchandisis edito tempore domini Edwardo quondam Regis Angliæ, progenitoris dominæ Reginæ nunc existentis. In cujus rei testiminonio huic presento scripto meo sigillum meum una cum sigillo dictæ dominæ nostræ reginæ de Recognitione debita villæ de K. super Hull prædictis præsentibus appensi. Datum coram R.J. Majore villæ de K. super Hull prædictæ et I.L. clerico ad hujus modi recognitionem debiti pro Merchandisis in

eadem emptis recuperandis ordinatam et provisam accipiendis deputatis 30 die Jan. Anno regni dictae dominæ Reginæ XXXVI.

West, Symboleography (Ed. 1615) Pt. I. § 106.

STATUTE STAPLE

Noverint universi per præsentes me I.H. de L. in comitatu Sussex armigerum teneri et firmiter obligari I.A. in etc. Solvendis eidem I.A. aut suo certo Atturnato hoc scriptum ostendendo, heredibus vel executoribus suis, in festo Purificationis beatæ Mariæ virginis proximo futuro post datum præsentium. Et si defecero in solutione debiti predicti volo et concedo quod tunc curret super me heredes et executores meos pœna in statuto stapulo de debitis pro Merchandisis in eadem emptis recuperandis ordinata et provisa. Datum XI. die Feb. anno regni dominæ nostræ Elizabethæ dei gratia etc.

West, Symboleography (Ed. 1615) Pt. I. § 108.

VI

GRANTS OF WARDSHIP AND MARRIAGE

A GRANT BY THE CROWN

Regina etc. Sciatis quod nos de gratia nostra speciali, ac ex certa scientia et mero motu nostris, dedimus et concessimus, ac per præsentes damus et concedumus dilecto servienti nostro A.B. uni Gromeriorum Cameræ nostræ, wardum et maritagium R.R. filii et heredis A.R. viduæ defunctæ: Neconon custodiam et gubernationem tam corporis prædicti R. quam omnium terrarum et tenementorum pratuum pascuorum et pasturarum suorum quorumcumque, jacentium et existentium in parochia de B. in comitatu nostro S. una cum redditu et proficuo eorundem, modo in dono et dispositione nostris existentibus, ratione minoris ætatis prædicti R. Habendum et tenendum wardum et maritagium prædicti R. etc. ac cætera præmissa, cum omnibus et singulis suis pertinentibus præfato servienti nostro et assignatis suis, durante minore ætate prædicti R. de dono nostro, absque computo sive aliquo alio nobis vel heredibus nostris pro præmissis reddendo solvendo vel faciendo. Eo quod expressa mentio etc. In cujus rei etc.

West, Symboleography (Ed. 1615) Pt. I. § 328.

A GRANT BY A SUBJECT

Omnibus etc. I Comes O salutem. Sciatis me præfatum comitem pro quadam pecuniæ summa mihi per T.M. generosum præ manibus soluta, dedisse et per præsentes concessisse eidem T. custodiam W.B. filiæ et heredis R.B. jam defuncti, Ac omnium terrarum tenementorum et hereditamentorum quæ ad manus meas devenire poterint ratione minoris ætatis ejusdem W. post mortem dicti R. qui de me tenuit die quo obiit per servitium militare. Habendum et tenendum custodiam prædictam ac maritagium prædictæ W. præfato T. et assignatis suis quousque prædicta W. ad plenam ætatem viginti unius annorum pervenerit, et quamdiu in manibus meis fore contigerit, seu remanere deberet. Et si contingat prædicta W. obire antequam ad plenam ætatem viginti unius annorum pervenerit, herede suo infra ætatem existente, tunc sciatis me præfatum Comitem pro consideratione prædicta dedisse et per præsentes concessisse præfato T. custodiam ejusdem heredis ac omnium terrarum tenementorum et hæreditamentorum prædictorum una cum maritagio ejusdem heredis, et sic de herede in heredem quousque unus eorum ad plenam ætatem viginti unius annorum pervenit. In cujus rei testimonium etc.

West, Symboleography (Ed. 1615) Pt. I. § 331.

VII

THE LAW TERMS AND THE DIES IN BANCO, OR RETURN DAYS

A good account of the origin and description of the law terms as they existed till the year 1875 is given by Reeves (H.E.L. i 232, 233) in the following passage: "The division of the year into term and vacation has been the joint work of the *church* and *necessity*. The cultivation of the earth and the collection of its fruits necessarily require a time of leisure from all attendance on civil affairs; and the laws of the church had, at various times, assigned certain seasons of the year to an observance of religious peace, during which all legal strife was strictly interdicted. What remained of the year not disposed of in this manner was allowed for the administration of justice. The Anglo-Saxons had been governed by these two reasons in distinguishing the periods of vacation and term; the latter they called *dies pacis regis*, the former *dies pacis Dei et sanctæ ecclesiæ* (citing Leg. Edw. Confess. c. 9). The particular portions of time which the Saxons had allowed to these two seasons were adhered to by the Normans, together with other Saxon usages, and their term and vacation were as follows: It seems that *Hilary* term began *Octabis Epiphaniæ*—that is, the 13th of January, and ended on Saturday next before Septuagesima, which, being movable, made this term longer in some years than others. *Easter* term began *Octabis Paschæ* (nine days sooner than it now does), and ended before the vigil of Ascension (that is, six days sooner than it now does). *Trinity* term began *Octabis Pentecostes*, to which there does not seem to have been any precise conclusion fixed by the canon which governed all the rest; it was therefore called *terminus sine termino;* it seems to have been determined by nothing but the pressing calls of haytime and harvest, and the declension of business very natural at that season. But the conclusion of it was fixed afterwards by Parliament; by Stat. 51 Hen. III. it was to end within two or three days after *quindena sancti Johannis*—that is, about the 12th of July. . . . *Michaelmas* term began on Tuesday next after St. Michael, and was closed by Advent; but as Advent Sunday is movable, and may fall upon any day between the 26th of November and 4th of December, therefore the 28th of November, as a middle period, by reason of the feast and eve of St. Andrew, was appointed for it." In the sixteenth century the king sometimes varied the dates of the term for special reasons by his prerogative (see Wriothesley's Chron. (C.S.) i 101, 102; ii 5); and some slight modifications in the dates of these terms were from time to time made by statute—32 Henry VIII. c. 21 shortened Trinity term; 16 Car. I. c. 6 and 24 George II. c. 48 affected the duration of Michaelmas term; 11 George IV., 1 William IV. c. 70 § 6 provided for the dates of the beginning and ending of all the terms. The result of these statutes was that at the beginning of the nineteenth century Michaelmas term lasted from November 8-22, Hilary January 11-31, Easter April 15 to May 8, and Trinity May 22 to June 12 (L.Q.R. xxxiv 320). As is pointed out by Mr. Mathew in the article in the L.Q.R. just cited, these terms were too short for the business to be done. Therefore the judges sat after term at Serjeants' Inn. "This judicial practice was sanctioned and extended by 3 Geo. IV. c. 102, which enabled the judges to sit for all purposes at Serjeants' Inn Hall, or 'some other convenient place,' for the dispatch of business." The terms thus fixed continued till their abolition by the Judicature Act (36, 37 Vict. c. 66 § 26).

When the parties in theory appeared in person before the courts (vol. ii 315-316) it was convenient to have certain fixed days in each term on which both the original writs should be returned, and on which each of the other

steps in the complicated process upon that writ should take place. The earliest definite regulation upon this matter seems to have been that made by the statute regulating the *dies communes in banco* (vol. ii 222; Reeves H.E.L. i 499). The result of fixing specific days at stated intervals from each other meant that, between each step in the action, there must elapse a fixed time; and this, as Reeves has shown, was the main cause of the enormous delays caused by process alone (above 624-626) during this period. The instance which he gives (H.E.L. i 500) will illustrate, better than pages of explanation, this cause of the weakness of common law precedure all through this period and later. "Suppose a summons in a personal action was returnable *in octabis Michaelis*, the 6th of October, the process of attachment issued upon that would be returnable *in octabis Hilarii*, the 20th of January. If the party did not appear, there issued a second attachment *per meliores plegios*, returnable *in octabis Trinitatis*, the 19th of June. If he did not then appear, there issued a writ of *habeas corpus* to take the body, returnable *in crastino Animarum*, the 3rd of November. Thus ended the *solemnitas attachiamentorum*, and so passed away a full year and almost one month. If the sheriff returned upon this last writ, as it is probable he would, *non est inventus*, they then resorted to the process of distress, and a *distringas per terras et catalla* would issue, returnable *in tres septimanas Paschæ*, the 8th of May. If he did not appear to this, there issued another *distringas*, returnable *in quindena Michaelis*, the 13th of October. If he did not appear, another *distringas* issued, *ne quis manum apponat*, returnable *in quindena Hilarii*, the 27th of January. If he still did not appear, another writ issued for a caption into the king's hands, returnable *in quindena Trinitatis*, the 26th of June. . . . And here ended the distress *per terras et catalla*, and the space of one year and more than seven months, so that the whole of this process, from the return of the summons to the return of the last *distringas*, would continue two years and more than eight months." In addition, as we have seen, infinite delays were possible by means of essoins, and by the process of fourching in essoins (above 624, 625). Small improvements were made from time to time, and, as I have said, process upon some actions was more speedy than upon others. But, notwithstanding the inconvenience of this system of fixed days for the performance of certain steps in the action, the system itself lasted on with but slight modifications (e.g. by 13 Charles II. st. 2 c. 2 § 6) till 1832. Blackstone tells us (Comm. iii 277, 278) that there are in each term stated days called "days in bank"—*dies in banco;* that is, days of appearance in the court of Common Pleas. They were generally at intervals of about a week from each other, and regulated by some church festival. All writs must be made returnable on some one of these return days. The first return day of the term the court sat to hear essoins, but, as three days of grace were always allowed to the party within which he might either appear or essoin himself, the court never sat till the fourth day after the nominal beginning of the term; and this was an old practice. "Before the fourth day of term," said *Stouford*, J., in 1346, "it has not been the custom for anyone to begin any plea, except a proffer on a writ of right" (Y.B. 20 Ed. III. (R.S.) i 456; and see Dyer 270a; Cro. Car. 102). The Uniformity of Process Act, 1832 (2, 3 Will. IV. c. 39), which created uniform forms of writs (vol. i 222, 240) and a uniform process thereon, swept away this system by enacting (§ 11) that, "if any writ of summons . . . issued by authority of this Act shall be served or executed on any day, whether in term or vacation, all necessary proceedings to judgment and execution may, except as hereinafter provided, be had thereon, without delay, at the expiration of eight days from the service or execution thereof, on whatever day the last of such eight days may happen to fall, whether in term or vacation."

VIII

SOME CRITICISMS ON THE DECISION OF THE HOUSE OF LORDS IN THE CASE OF THE ADMIRALTY COMMISSIONERS v. S.S. AMERIKA [1]

In this case the House of Lords have accepted the view that the rule in *Baker v. Bolton* [2] is not derived from Roman Law, and that it is quite distinct from the rules based on the maxim *actio personalis moritur cum persona*. But they have upheld it; and, in order to justify their decision, they have appealed to legal history. Lord Sumner gives us a sketch of the history of criminal procedure from the days of bot and wite.[3] He draws from it the conclusion that the action of trespass never dealt with homicide, and that this was the real gist of the decision in *Higgins v. Butcher*.[4] But this view ignores the reasons given by the judges themselves in the last-mentioned case, and it does not explain why in the case of homicide, as in the case of any other felony, the right of action for tort cannot be exercised after the claims of justice have been satisfied. An attempt to give this explanation is made by Lord Parker. He lays it down, in the first place, that for a death caused by an act of violence on the part of the defendant no action of trespass would lie —the death "could not be alleged without alleging felony, and for felony trespass would not lie."[5] This he considers to be an absolute rule of law, not based on the rule of public policy that in the interests of justice a felon must be prosecuted before an action in tort will lie.[6] But he allows that in the case of some felonies, e.g. burglary or larceny, the prohibition of suing in tort is based simply upon this rule of public policy, and that therefore, when the felon has been prosecuted, the right to sue in tort can be exercised.[7] But what is the basis of this distinction between homicide and other felonies? It cannot be based upon a distinction between felonies committed against the person and felonies committed against property, as there is authority for saying that in a case of rape the civil remedy is only suspended in accordance with the ordinary rule of public policy.[8] The only basis which appears possible seems to be contained in the following passage of his judgment: "Before any question of public policy can arise it has first to be ascertained whether civil proceedings will lie at all. Most felonies involve a wrong less than a felony, and for such a wrong civil proceedings will lie when once the demands of public policy have been satisfied. But there may be felonies when the only wrong is the felony itself, and it may well be that the felony cannot be made the subject of complaint in civil proceedings."[9] This test will no doubt distinguish cases in which a felony gives rise to an action in tort from cases in which it does not. But, tried by this test, a homicide which causes a master to lose the services of his servant, or a husband to lose the consortium of his wife, should give rise to actions *per quod servitium* or *consortium amisit* when the claims of justice have been satisfied, because the killing of a servant or wife involves a "wrong less than felony" to the master or husband, no more and no less than larceny involves a wrong less than felony to the owner of stolen goods. I should contend therefore that according to Lord Parker's own theory the rule in *Baker v. Bolton* cannot be supported. It is true that both Lord Parker and Lord Sumner seem to regard these actions *per quod*

[1] [1917] A.C. 38.
[2] (1808) 1 Camp. 493.
[3] [1917] A.C. at pp. 56-60.
[4] (1606) 1 Yelv. 89.
[5] [1917] A.C. at p. 46.
[6] Ibid at p. 47.
[7] Ibid at pp. 47-48.
[8] Ibid at pp. 48-49; Smith v. Selwyn [1914] 3 K.B. 98.
[9] [1917] A.C. at p. 49.

servitium or *consortium amisit* as somewhat anomalous survivals from the time when society was based on status rather than on contract.[1] But even if they are anomalous they still exist; and the House of Lords in this very case admitted that they could not set aside well-established rules. It does not follow, said Lord Sumner,[2] "in the case of a legal system such as ours that a principle can be said to be truly a part of the law merely because it would be a more perfect expression of imperfect rules, which though imperfect are well established and well defined." It is obvious that these actions *per quod servitium* and *per quod consortium amisit* are, to say the least, as well established as this rule in *Baker v. Bolton;* nor do they give rise to such obvious injustice as that rule. Ultimately they are based upon the very peculiar history of the legal relations of master and servant, which has caused those relations to retain a number of ideas based on the conception that the servant occupies a status. The Statutes of Labourers deliberately introduced into the contractual relation some of the incidents of older status;[3] and the courts of common law, quite apart from those statutes, held that the master's right to his servant's service was definite enough to be safeguarded by an action in tort against a person who retained a servant after notice of an employer's claims.[4] It is pretty clear also that the famous decision in *Lumley v. Gye*[5] to the effect that a persuasion to break any contract without just cause or excuse is actionable, is traceable historically to the firmness with which the judges have maintained the idea that the master has something in the nature of a real right to his servant's services. It seems to me therefore that the legal history to which the House of Lords has appealed to justify the rule in *Baker v. Bolton* has proved to be a very hostile witness. It follows that we can only regard the decision as perhaps the strongest illustration which we have in our books of the manner in which *communis error* sometimes *facit ius*.

[1] [1917] A.C. at pp. 44-45, 60.

[2] Ibid at p. 56; apparently the Solicitor General pointed out that the reversal of Baker v. Bolton would be a very similar action to the reversal of the case of Thorogood v. Bryan by the case of The Bernina—a reversal universally approved; the parallel was apt; but Lord Sumner remarked that "this is hardly the right view to take of your Lordship's judicial functions nowadays;" no doubt it is not their lordships' duty to upset well-ascertained rules of law; but it is as obviously their duty to correct clearly mistaken decisions; nor is it obvious that the views held of their lordships' functions have so radically changed between 1888—the date when the case of the Bernina was decided—and 1917; and this truth is abundantly proved by the case of Bourne v. Keane [1919] A.C. 815.

[3] Vol. ii 461-464; Bk. iv Pt. I. c. 1.

[4] Blake v. Lanyon (1795) 6 T.R. 221.

[5] (1853) 2 E. and B. 216.

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PRINTED IN GREAT BRITAIN AT THE UNIVERSITY PRESS, ABERDEEN